In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JOSEPH W. PARISH & CO., FOR THE USE OF JOSEPH W. PARISH, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE.
} No. 720.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

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JOSEPH W. PARISH & CO., FOR THE USE OF JOSEPH W. PARISH, APPELLANTS,
vs.
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No. 720.

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BRIEF FOR THE UNITED STATES.

In this case, the appellants (claimants) demand $251,887.72, for ice which they allege that the United States contracted to receive of them at Saint Louis, Nashville, Memphis, and Cairo, in the year 1863, and *afterwards refused to receive.*

The facts are, that upon the 22d of January, 1863, (Record, p. 13,) the United States advertised for proposals for furnishing the medical and hospital department with ice until the 1st of January, 1864, at (amongst others) the above places, stating that, *as the quantity required at each was not precisely known*, "bidders will state the quantity of ice they can furnish," "what facili-

ties they possess, if any, *for storing the ice* at the points they propose to supply," &c. Thereupon, (March 5, 1863,) a contract was made (Record, 14 and 8) with the claimants to deliver, at the points above mentioned, "*the whole amount of ice required to be consumed during the remainder of the year* 1863," at prices averaging rather more than 1 cent per pound, payments to be made upon receipted bills of lading, and no more than three working days to be allowed by the claimants for discharging each cargo at either one of the above places.

On the 25th of March, 1863, the following order was issued in reference to the subject-matter of the above contract:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
"*Saint Louis, Missouri, March* 25, 1863.

"Messrs. J. W. PARISH & Co.:

"GENTLEMEN: I am instructed by the assistant surgeon-general to direct that the ice which you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities, viz:

"At Saint Louis..... 5,000 tons.
"At Cairo..... 5,000 tons.
"At Memphis..... 10,000 tons.
"At Nashville..... 10,000 tons.

"Making the total of 30,000 which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay.

"Very respectfully, your obedient servant,
"By order of the Assistant Surgeon-General,
(Signed) "JOSEPH B. BROWN,
"*Surgeon, United States Army.*"

A copy of this order being received at the Surgeon-General's Office, the following telegram and letter were sent to Assistant Surgeon-General Wood:

"SURGEON-GENERAL'S OFFICE,
"*March* 31, 1863.

"Parish & Co. have not contracted for 30,000 tons of ice. Suspend the order you gave him.

"(Signed) W. A. HAMMOND,
"*Surgeon-General.*

"Col. R. C. WOOD,
"*Assistant Surgeon-General, U. S. Army,*
"*Saint Louis.*"

"SURGEON-GENERAL'S OFFICE,
"*Washington, D. C., March* 31, 1863.

"SIR: Your communication of the 25th instant to J. W. Parish & Co., in regard to the quantities of ice to be delivered at the different points for which they contract, forwarded to this office for the information of the Surgeon-General, has been received.

"I am instructed to inform you that the contract with Parish & Co was made for such quantities as might be needed; and that the ice should be ordered from them, from time to time, to different points, in lots of a few hundred tons, as needed.

"Very respectfully, your obedient servant,
"C. H. ALDEN,
"*Assistant Surgeon, U. S. A.*

"Col. R. C. WOOD,
"*Assistant Surgeon-General, Saint Louis, Mo.*"

In this connection the following telegram was sent, but not addressed to the claimant at his residence or place of business:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
"*Saint Louis, Mo., March* 31, 1863.

"To J. W. PARISH & Co.,
"(Care of C. H. Wicker & Co.,)
"*Chicago, Ill.:*

"I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

"(Signed) R. C. WOOD,
"*Assistant Surgeon-General.*"

It does not appear that this dispatch ever reached the claimants or either of them. The claimant Parish did have knowledge of this notice by oral information from the assistant surgeon-general at Saint Louis on the 2d day of April following.

Before Parish received the order of March 25, 1863, he had purchased some 8,100 tons of ice, and after receiving such order, and in pursuance thereof, and before being apprised of Hammond's order of March 31, "he had purchased or contracted for the purchase of 23,000 tons of ice.

The whole amount of ice received by the officers of the Government under said contract was about 12,768 tons.

By letter dated April 30, 1863, Wood inclosed to Parrish & Co. a copy of Hammond's letter, [of 31st March, 1863,] and advised them *to establish depots of ice at the above points, to be kept at all times amply supplied to fill all necessary requisitions that from time to time might be made upon them.* Of this proceeding he at the same time duly apprised the Surgeon-General.

The order of March 25, 1863, remained suspended until the expiration of the year, and of the contract.

I presume that it will be admitted that the ice (12,768 tons) actually supplied by the United States at the above points was all that was required there by the public wants; and, therefore, that the claimants seek to recover on account of this surplus ice (which the United States did not receive, and ought not to have had, and against their being bound for which they had originally made reasonable provision by the contract) merely because it has been so nominated in the above order.

I grant that this may be a sufficient ground for recovery by the claimants; but it needs strict proof to establish a state of things leading to such a result.

I submit that it appears by the original contract, as commented upon by the parties previously to the above order of the 25th of March, that the contractors were thereby to establish stores of ice convenient to the points to be supplied by them, and that the United States were to order ice therefrom, as needed, in large quantities of, perhaps, *a cargo*, or *several hundred tons*, or the like. For, by the advertisement, the contractors were to state, as evidence of their fitness to contract, not only what amounts they could furnish, *but also what facilities they had for storing the ice at the point;* and after making the contract, and previously to any *order*, the contractors purchased 8,100 tons of ice; which amount if it seem to be the result of a calculation by the contractors as to the amount of ice which they would have to store up in order to answer probable requisitions under their contract, indicates better judgment thereabout than that which is attributed by their claim to the

assistant surgeon-general. It will be observed that the telegram from the Surgeon-General of the 31st of March places the same construction upon that contract; and that the price to be paid per pound for the ice (*one cent*) seems to the same effect.

If this be so, it also seems that, in good faith to the principal in the contract with them, (the United States,) it was the duty of Parish & Co. to call the attention of the assistant surgeon-general to the error into which he had fallen, in placing so *exorbitant* a construction (to say no more) upon that contract. When I say "exorbitant construction," I allude to that attributed to him by the claimants; a suggestion, however, which I propose to show is not well-founded.

It is not competent for contractors with the United States to *snatch at* questionable constructions favorable to themselves, made by the agents through whom the United States have to deal; and then, by hasty action thereunder, *fix* such construction. Still more inadmissible is such pretension when, as is the case here, the contractor was aware that the agent of the United States was dealing under a misapprehension.

It seems that if the United States contracted with the claimants to furnish ice *from time to time* during the coming season of the year, although *by the cargo*, it was not competent for any official to require it to be furnished all at once at the beginning of the season; and therefore that, although the particular state of the case here as regards the article to be purchased, the price, &c., may have *tempted* the contractor to comply with the order, yet by complying he procured for himself no right of action *under the contract.*

No doubt some room for discretion as to time and

amounts was given by the contract; but although it may not be easy to draw a line betwixt what was and what was not allowable under the terms of the contract, the present case gives no occasion for such difficulty. Because, to consider the case as regards the post at *Nashville* only, it appears that the United States reserved the right to say, as exigencies might arise, and as the *unknown term* in the transaction (viz, the future movements, accidents, &c., of the army) was resolved by time, what amount of ice might be needed there; and it also appears that in that way it would have been ascertained that 750 tons were all that would be needed; yet, *at the very opening of the season*, 10,000 tons are said to have been required by an agent of the Government; and the contractor without remonstrance went about to supply it. The present is not a case in which the court is called upon merely to re-adjust, upon a question of more or less, the determinations of a competent official discretion. I concede that the court would not do that. It seems, however, that the assistant surgeon-general could not have thought that the United States had left open, subject to their own discretion, the matter of *quantity*, merely that it should be closed by him twenty days afterward, at a time when no more light had been thrown upon the question than when the contract was first made; and that the contractors in attempting to hold the United States responsible for such gross laches, and hastily setting about to clinch the order by making purchases thereunder acted in a manner far from innocent.

I submit, therefore, that the construction which the claimants attribute to the order of the 25th of March amounts to a total departure from the original contract.

In further prosecution of the argument, I also submit—

1. That the order of the assistant surgeon-general of the 25th of March is, upon its face, an order merely *to distribute the amount of ice which he supposed to have been already ordered* by the United States.

2. That the record shows that upon being apprised that the Surgeon-General had called his assistant's attention to such mistake and directed that order to be suspended, *the claimants acquiesced therein and fell back upon the construction indicated by the Surgeon-General;* a construction which, as I have already said, was suggested as well by the preliminaries to such contract as by their own earlier action thereunder.

1. The order of the assistant surgeon-general is one merely for *distribution.*

It is substantially as if it had been worded as follows: *Whereas you have contracted to furnish* 30,000 *tons of ice, I hereby direct you to distribute the same as follows, &c.:* I need not suggest that if the *preamble* of such order were untrue, the *direction* could not be resorted to to supply its place. The direction was given *diverso intuitu.* The officer understood that he was exercising a discretion upon behalf of the United States in pronouncing, *not* how much upon the whole was needed, *but* how the amount which had been determined upon by others should be distributed.

Therefore, when the claimants proceeded to act as they did under that order, they acted knowing that the discretion reserved to the United States *of saying how much ice would be needed in all* had never been exercised. Such action was, therefore, in their own wrong.

2. The record shows that, upon being informed of the

views of the Surgeon-General upon the contract, the claimants acquiesced therein.

The *petition* states that the 12,768 tons delivered, were delivered *under the order of the 25th of March.* The court do not find that suggestion to be true. On the contrary, they find that the order of the 25th of March remained *suspended perpetually, i. e.*, until the close of the year, and of the contract. No action of the parties, therefore, can be referred to that; and thus it is plain that the ice was delivered under other requisitions.

The case, then, is as follows: An order having been given for 30,000 tons of ice, notice of its modification is subsequently (within ten days) given to the party from whom it was ordered. With those modifications he complies, but finding in the end that the order, (or orders,) as modified, did not cover 30,000 tons, he sets up a claim under the order as originally issued. The claimants did not supply the new orders out of other stores of ice, or give contemporaneous notice that they insisted upon their rights under the first order. *They turned the* 30,000 *tons of ice over*, as it were, to the purposes of the new orders, believing that, after all, *these* would exhaust it. The fact that they did so believe, as also the foundation for such belief, is suggested by them in their petition, (paragraph last but one, Record, p. 10.) It was entirely without purpose for them to state, as they do there, that the official who verbally notified them of the *suspension* of the first order, *also at the same time told them that this would make no difference in the quantity of ice ordered, as the entire qantity would be needed*, unless they meant to suggest that such assurance had some effect upon them; in other words, *misled* them. The official's duty and commission, however, terminated with the *notification;* and in listen-

ing to his *assurances*, the claimants could rely only upon his *personal* judgment. What is important here is that the record not only implies in general an acquiescence by the claimants in the correction made by the Surgeon-General, but also, in *confirmation* of such suggestion, assigns at one point *a reason* for such acquiescence. With the soundness of such reason, or the realization of the hopes which it held out, we have nothing to do; it is enough that there was a deliberate *acquiescence* in the modification of the order. Such acquiescence leaves no place of repentance.

The claimants complain (through their learned counsel) that they were more injured by the *suspension* of the order than they would have been by its *retraction*. Inasmuch as any *retraction* must have left them still subject to the terms of the original contract, it is not admitted that this complaint is well-founded. But if it were, it seems a fault in the claimants not to have required the United States to clear up the state of doubt into which, as is said, such suspension plunged them. It seems that, under the operation of the original contract, *suspension* was the proper term to apply to the action by the Government, inasmuch as an order which is withdrawn with the view of its being replaced by other orders to the same effect may well be said to be suspended.

However, it was necessary, when the United States took position upon the order, that the claimants should also at once take the position which they meant to maintain. They were required, as regards the act complained of, to place themselves in and thereafter to maintain a state (so to say) of forensic hostility toward the United States. If they waived their rights, or

acted so as to induce the United States to believe that they had *waived* them, and to act accordingly, such rights cannot be set up again. Knowing that the United States disaffirmed the order for 30,000 tons, and also knowing their views in giving the subsequent orders as stated in the letter of the Assistant Surgeon-General of April 3, 1863, (Record, p. 13,) it does not appear that they ever remonstrated against such disaffirmance, or declined to comply with the substituted orders, or to receive payment tendered upon the footing of such orders. Their present endeavor, to refer such subsequent action to the first order, (Petition, p. 10, paragraph 6,) while necessary for their success, is a mere afterthought, and is inadmissible.

In Mason *v.* The United States, (17 Wallace, 67) the claimant had entered into a contract with the United States for the manufacture of 100,000 guns. Afterward, commissioners were appointed by the Government, who, against the will of the claimant, cut the order down to 30,000 guns and required the claimant to enter into contract for that reduced amount. This was done by the claimant, and the contract as modified was also executed, but afterward he made claim that this contract did not prevent him from suing the United States for the damages occasioned by the breach of the original contract.

While it is admitted that the evidence in the present case, of acquiescence in the substituted orders and consequent waiver of the original agreement, is not as express and formal as in Mason's case, I submit that substantially it is quite as strong, and, therefore, I quote from the opinion of Mr. Justice CLIFFORD, at page 72, the following passage, which appears to be equally pertinent to the claim of Parish & Company:

"Much discussion of the case is certainly unnecessary, as it is as clear as any proposition of fact can be, that the claimant voluntarily accepted the modification of the contract [order] as suggested by the commissioners, [the Surgeon-General,] and that he executed the new contract [order] in its place, which he must have understood was intended to define the obligations of both parties. His counsel suggest that he accepted the new contract [order] without relinquishing his claim for damages arising from the refusal of the United States to allow him to furnish the whole 100,000 muskets, [30,000 tons,] but the court is unable to adopt that theory, as it is quite clear that he could not have acted with any such motive consistent with good faith toward the War Department, as he must have known [see order of Assistant Surgeon-General, April 3, 1873, Record, p. 18,] that the Chief of Ordnance [Assistant Surgeon-General] supposed, when he, the claimant, returned the written contract duly executed [or received the substituted order without objection] that the whole matter in difference was adjusted to the satisfaction of all concerned. Parties are bound to good faith in their dealings with the United States as well as with individuals," &c.

S. F. PHILLIPS,
Solicitor-General.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 875.

THE UNITED STATES, APPELLANT,

vs.

CHARLES BOWEN.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 3, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 875.

THE UNITED STATES, APPELLANT,

vs.

CHARLES BOWEN.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed March 1, 1878	1	1
Traverse	4	2
Findings of fact and conclusion of law	5	2
Opinion of the court	5	3
Dissenting opinion	10	8
Final judgment	17	15
Appeal	18	15
Certificate	19	16

1 I.—*Filed Mar.* 1, 1878.

In the United States Court of Claims.

CHARLES BOWEN
vs.
THE UNITED STATES. } No. 11913.

And now comes your petitioner, by Messrs. Carpenter and Coleman, his counsel, and respectfully represents and shows to the court—

That at the time and times hereinafter mentioned, the said Charles Bowen was, and still is, a citizen of the United States.

That he enlisted as a soldier in the Army of the United States on the 9th day of March, in the year 1861.

That he continued in the military service of the United States until the 9th day of March, 1864, when he was honorably discharged from said service, by reason of expiration of the time of his service.

That he was wounded while in said service, at the battle of Gettysburg, on the 2d day of July, 1863, by a bullet passing through the right cheek and out of the left eye, and also by a bullet passing in at the mouth and out of the right jaw, causing a fracture of the jaw bone.

Your petitioner further shows that by reason of said service and said disability, occasioned as aforesaid, he became and was entitled under the laws of the United States to a pension; and that he was duly granted a pension, to take effect on the 9th day of March, 1864,
2 by the Commissioner of Pensions of the United States, of eight dollars per month, which was on the day of June, 1866, duly increased, by reason of further disability, arising from said wounds, to the sum of eighteen dollars per month, which said pension your petitioner is still entitled to receive, and has been since the date of its allowance.

Your petitioner further shows that during the time of his service as aforesaid, he contributed to the support of the "Soldiers' Home," located at Washington, in the District of Columbia, agreeably to the requirements and provisions of chap. 25 of the Statutes at Large of the United States for the year 1854, and of the acts amendatory thereof.

Your petitioner further shows that from the time of the granting of said pension to the present time he has been, and still is, incapacitated from work, labor, and service, by reason of his disability, occasioned as aforesaid; and is now, and has been since the 11th day of September, 1876, an inmate of said "Soldiers' Home," and has, during said time, received and enjoyed its benefits.

That since the time of his so being an inmate of said Home the amount of his said pension has been withheld from him by the United States, although he has often duly demanded, from the proper authorities of the United States, that the amount so due to him thereon be paid to him, which said authorities have at all times refused, and still do refuse to do; but have, as your petitioner is informed and believes, paid the amount of said pension money so due your petitioner to the said Soldiers' Home, which said payment has been without authority of law, and contrary to the wishes of and against the protest of your petitioner.

Your petitioner further shows that the said United States are justly indebted to him in the sum of two hundred and seventy dollars, being the amount of pension money due him from the 11th day of September, 1876, to the 14th day of December, 1877, and so withheld from him as

aforesaid; and that for said sum he has heretofore made due claim and demand from the proper authorities of the Government of the
3 United States, whose duty it was, by law, to pay the same, and that said claim has been in each case disallowed, and payment thereof refused to him.

Your petitioner further shows that no assignment or transfer of said claim or interest therein has been made; that he is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, and that he believes the facts stated in his petition to be true.

Wherefore your petitioner prays judgment against the said United States for the said sum of two hundred and seventy dollars, so due him as aforesaid.

CHARLES BOWEN.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Charles Bowen, being duly sworn, says that he is the petitioner named in the foregoing petition subscribed by him; that he has heard the same read, and knows the contents thereof, and that the facts therein stated on his personal knowledge are true, and the facts therein stated on his information and belief he believes to be true.

CHARLES BOWEN.

Sworn and subscribed before me, this 23d day of February, A. D. 1878.

R. MCALLISTER, JR.,
Notary Public.

CARPENTER & COLEMAN,
Counsel for Petitioners, No. 1330 F st., Washington, D. C.

4 II. *Traverse.—Filed M'ch* 11, 1878.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney General.

5 III.—*Findings of fact and conclusions of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant was a private in Company B, Third Regiment United States Infantry, from the 9th March, 1861, to the 9th March, 1864, and during that time, under the provisions of section 7, act 3d March, 1859 (11 Stat., 434), there was deducted from his pay the sum of $4.57.

II. An invalid pension was granted to him March 13, 1865, at $8 per month, commencing March 9, 1864, by certificate No. 39050; the monthly rate of such pension was increased from $8 to $15, January 21, 1867, to commence June 6, 1866; and from $15 to $18, July 8, 1876, to commence June 4, 1872.

III. On the 13th September, 1876, he was admitted as an inmate to the Soldiers' Home, and his pension from that date to the 4th of December, 1877, to wit, the sum of $264.60, has been regularly paid to the treasurer of that institution.

Upon the foregoing facts, the conclusion of law is that the claimant should recover the sum of $264.60.

IV.—*Opinion of the court.*

HUNT, J., delivered the opinion of the court.

The claimant was a soldier in the Army of the United States from 9th March, 1861, until 9th March, 1864, when he was honorably discharged. An invalid pension was granted to him on the 13th March, 1865, and was subsequently increased, such increase commencing June 6, 1866. During the time of his service in the Army he contributed to the Soldiers' Home, located at Washington, D. C., the sum of 12½ cents per month, deducted from his monthly pay. On the 13th September, 1876, he was admitted an inmate of the Soldiers' Home. From that date to the date of his filing his petition in this case he has continued to enjoy its benefits. During this period his pension has been paid to the treasurer of the Home.

He now brings this suit to recover the sum thus paid.

The claimant's right is derived from the provisions of law found in chapter two, Title LIX, of the Revised Statutes of the United States. The chapter is entitled "The Soldiers' Home," and was manifestly intended to constitute a complete body of laws by which the institution was to be regulated and controlled, the rights of its inmates defined, and the terms and conditions prescribed under which persons might become its inmates and entitled to enjoy its benefits. The chapter provides who shall be members of the Soldiers' Home; who shall constitute a board of commissioners, and what shall be their duties; who shall be officers of the Home; how and by whom sites and buildings shall be procured; appropriates funds for its support; enforces a deduction of 12½ cents per month from the pay of every officer, musician, artificer, and
6 private of the Army to be passed to the credit of the Home; but expressly declares that in the case of regiments of volunteers, or other corps or regiments raised for a limited period, or for temporary purposes, such deduction shall only be made with their consent; provides that the fact that a pensioner for wounds or disability has not contributed shall not preclude him from admission to the Home, but such pensioners shall surrender their pensions to the Home during their stay therein; designates what persons are entitled to the benefits of the Home, viz, 1°. Every soldier who has served or may serve honestly and faithfully twenty years in the Army. 2°. Every soldier or discharged soldier, whether regular or volunteer, rendered incapacitated for further service from disease or wounds incurred in the service. 3°. The invalid and disabled soldiers, whether regulars or volunteers, of the war of 1812, and subsequent wars; excludes convicts and other unworthy persons from the benefits of the Home; provides for the discharge of those admitted for disability on the recovery of their health; and, finally, subjects all inmates to the Rules and Articles of War in the same manner as soldiers in the Army.

It is apparent from this summary that this chapter is designed to embrace the entire subject of all antecedent statutes relating to the Soldiers' Home; that it forms a revised and condensed statement of all the laws now in force on the subject, including all that was intended to be preserved of the old laws, and establishing with great minuteness and particularity of detail everything necessary to the entire and appropriate use, management, and discipline of the institution.

In order to determine the rights of the claimant involved in this suit, it becomes necessary to make a more critical examination of those sections of the law which regulate and define the terms upon which inmates are admitted to enjoy the benefits of the Home.

Section 4814 declares that "All soldiers of the Army of the United States, and all soldiers who have been, or may hereafter be, of the Army of the United States, and who have contributed, or may hereafter contribute, according to section 4819, to the Soldiers' Home hereby created, and the invalid and disabled soldiers, whether regulars or volunteers, of the war of 1812, and of all subsequent wars, shall, under the restrictions and provisions which follow, be members of the Soldiers' Home, with all the rights annexed thereto."

The contribution here referred to according to section 4819 is exacted in the following terms:

"There shall be deducted from the pay of every non-commissioned officer, musician, artificer, and private of the Army of the United States the sum of 12½ cents per month, which sums so deducted shall, by the Pay Department of the Army, be passed to the credit of the Commissioners of the Soldiers' Home. * * * But the deduction of 12½ cents per month from the pay of non-commissioned officers, musicians, artificers, and privates of regiments of volunteers, or other corps or regiments raised for a limited period, or for a temporary purpose or purposes, shall only be made with their consent."

These sections of the statutes recognize and create two distinct classes of beneficiaries of the Home. The first class is composed of all soldiers, &c., of the Army who have contributed or may hereafter contribute to the support of the Home, and whose contributions are involuntary assessments required to be deducted from their monthly pay; and of non-commissioned officers, &c., of volunteers or other corps or regiments raised for a limited time or a temporary purpose, whose contributions are voluntary, and shall only be made with their consent.

The second class is composed of invalid and disabled soldiers, regulars or volunteers, of the war of 1812, and of all subsequent wars, whose services must have been anterior to the foundation of the Home, and who, therefore, could not have contributed.

7 In other words, these sections clearly distinguish between one class of persons who are contributors, and another who are non-contributors.

To those who are contributors, the doors of the Home are at once thrown open; but to those who are non-contributors they are closed, except on prescribed conditions. Soldiers wounded or disabled in the service, to whom pensions have been granted, although they may not have contributed, are not precluded from admission to the Home; but they must surrender their pensions to it during the time they remain there and enjoy its benefits. Section 4820 of the Revised Statutes declares that "The fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home shall not preclude him from admission thereto. But all such pensioners shall surrender their pensions

to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits."

The object and spirit of the whole legislation seem to have been to secure and maintain, by means of contributions levied upon all, a suitable home for soldiers who have grown old or become disabled in the service of their country. The right of membership is made to depend on the fact of contribution. Those who contributed out of their pay during their service, become members; but pensioners who did not then contribute are required to contribute now, on becoming members, by surrendering their pensions during the period they enjoy the benefits of the Home. The forced contribution per month is so light and so judiciously adjusted as to be scarcely felt by those upon whom it is levied, and seems to have been based, as was suggested in argument, upon a principle analogous to that of the contract of insurance, where one of many who pay small assessments, upon the happening of a contingency, derives disproportionately great advantages.

This interpretation of the statutes is in entire harmony with section 4821 of the chapter under consideration. That section declares who only shall be entitled to the benefits of the Home, and excludes all others. Those admitted are, 1°, soldiers who have served or may serve in the army faithfully for twenty years; 2°, those who may have suffered or may suffer under disabilities in the service; and 3°, the invalid soldiers of the war of 1812 and subsequent wars. The first class must necessarily have contributed monthly under the law. The second must also have contributed, in like manner, if they became disabled since the foundation of the Home in 1851; and the third class must have been pensioned before the Home was established, and they contribute by surrendering their pensions during their stay there. The rule of contribution applies alike to all classes who desire the benefits of the institution, and are entitled to them.

From what has been said, it follows that the claimant having contributed to the funds of the Soldiers' Home is entitled to its full benefits, and that he is not required to surrender his pension, as other pensioners are required to do in case they have not previously contributed to the institution.

It is contended in behalf of the government that, if the terms of section 4820 of the Revised Statutes may be fairly interpreted so as to reproduce the law as it previously stood, to give to the section a modifying effect would be unwarranted. But in this instance the terms are too plain to admit of any doubt. There is no room for interpretation. If the section works a modification of the previous laws, the court is not at liberty to make it work otherwise; in other words, to disregard its provisions, and, by a forced construction, to reproduce the old law in
8 their stead. Courts sit to administer and not to make laws; and although it is an admitted rule that they may, upon occasion, look beyond a statute which is the subject-matter of interpretation for the purpose of ascertaining its meaning, that rule has no application to cases where the language is plain and unambiguous, the grammatical structure simple and accurate, and the meaning of the whole intelligible and obvious to any ordinary understanding. Whatever palpable modifications, alterations, or changes of pre-existing laws may be found in the Revised Statutes are as much in force as any of their other provisions.

The principle applicable to interpreting a revision of laws similar to that now under consideration has been so often enunciated as to become

familiar. A reference to a few authorities of acknowledged reputation will not, however, be inappropriate:

"It is a well-settled rule," said the supreme court of Massachusetts, Wilde, J., "that when any statute is revised, or one act framed from another, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. We are not, therefore, at liberty to suppose that the proviso or exception was omitted by mistake." Ellis vs. Page (1st Pick., 45).

The rule is thus laid down in Smith's Com. on Stat. Constr., § 785: "Where some parts of a revised statute are omitted in the revising act, the parts omitted are not to be deemed as revived by construction, but are to be considered as annulled." And again, § 786, Id.: "A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law as well as on reason and common sense, operate to repeal the former."

The United States circuit court for New York, in the case of Boucicault vs. Hart, applied these principles in the interpretation of these very Revised Statutes. The court held, through Mr. Justice Hunt, its organ: "The various acts mentioned have been referred to to show to some extent the history and previous condition of the law on the subject under consideration. They are all superseded by the Revised Statutes of the United States, a work undertaken by authority of a statute passed June 27, 1866, and taking effect on 1st December, 1873." (13 Blatch., p. 52. See also Holmes vs. Wiltz, 11 La. An. Rep., 446.)

The case of jurors in the United States courts who may be required to take the additional oath prescribed in section 821 of the Revised Statutes is in point to show the effect given to the provisions of these statutes. Although the oath had been by an act of Congress expressly abolished, yet, in consequence of its having found its way into the Revised Statutes, and being there, it is treated as a valid enactment, and has been held to be so by the courts. In United States vs. Hammond (2 Woods C. C. Rep., p. 203), the court said: "The compilers may have exceeded their authority, Congress may not have designed to re-enact section 820, but it has done so, and we cannat go behind the law and cure the mistakes and inaccuracies of Congress." "We are bound," said Mr. Justice Buller, in Jones vs. Smart (1 Term, 44), "to take the act of Parliament as they made it."

But the repeal of the sections of the acts of 1851 and 1859 does not result solely from the fact that the subject-matter of each of them is embraced in the provisions of section 4820 Revised Statutes. Section 5596 of those statutes expressly repeals all acts prior to the year 1873,

"any portion of which is embraced in any section of the revision,
9 and provides that the section applicable shall be in force in lieu thereof." (Rev. Stat., sec. 5596, p. 1085.) Congress evidently did not intend to re-enact either of the former statutes, but did intend to enact a new statute in lieu of them both.

These Revised Statutes were enacted in order to present the entire body of the laws of the United States to the people in a concise and compact form, extricated from the confusion in which they had become involved in seventeen large volumes through which they lay scattered. The object was to relieve one from the necessity of having recourse to the earlier statutes, except in cases of grave doubt or of absolute conflict between different sections of the revision. If errors have crept into the

work of the commissioners, it is better that they should stand until corrected by subsequent legislation than that the whole body of laws should be thrown into such doubt and confusion that no one may longer feel any confidence that he knows what the law is by reading the latest enactment made by Congress. Congress seems to have entertained these views, and to have acted in accordance with them. Thus we find that in 1875 an act was passed "to correct errors and supply omissions in the Revised Statutes of the United States," and that in several hundred instances corrections of errors were expressly made in the statutes. (18 Stat. at Large, p. 316.) Other corrections have been since made by other similar acts, thus showing that as the Revised Statutes stand they constitute, and are held to be, the law, until altered or repealed by express subsequent legislation.

But if we recur to previous laws on this subject, their history and condition, we are justified in believing that such changes as may have been effected by the Revised Statutes are not, in this instance, the result of accident or oversight, but were effected deliberately and ex industria.

Under the original statute founding the "Military Asylum," all soldiers who contributed became members, and pensioners who had not contributed became entitled to its benefits only upon transferring their pensions. (9 Stat. at Large, pp. 595, 596, secs. 1, 5, 7.) So the law stood for 8 years, when, in the appropriation act of March 3, 1859, it was provided that pensioners of the war of 1812 and of subsequent wars might be admitted to the asylum, and that all pensioners should transfer their pensions during the time they remained therein.

From this brief statement we at once perceive that the legislation had become involved in uncertainty and contradiction when the revisions of laws was undertaken. An examination of section 4820 Revised Statutes will show that portions of all of the previous sections on the same subject-matter are embraced in its provisions. It is made up of passages taken from both statutes. The order of the sentences adopted is sometimes inverted and their phraseology is often changed. These alterations and amendments plainly indicate a careful purpose to settle clearly for the future and to re-establish the system of contribution originally enacted for the regulation of the asylum.

An effort is made to construe this section 4820 as applying to all pensioners and requiring all to surrender their pensions upon entering the Home. But this construction is evidently forced, and is overthrown by the plain language of the section itself. It seems to be only necessary to read the language in order to refute the construction. The section is reproduced at the expense of repetition, and is as follows:

"SEC. 4820. The fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home shall not preclude him from admission thereto; but all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits."

And it is argued that "the words 'all such pensioners' here mean all persons to whom pensions have been granted for wounds," and that "the fact" mentioned that one has not contributed is not descriptive of the pensioner. The argument is sophistical and unsound. The fact referred to in the statute is the fact of non-contribution by pensioners, and is as much a description of the individuals as the other clause speaking of them as pensioners for wounds. The word "such" means pensioners of the like kind; that is, pensioners on ac-

count of wounds who have not contributed. If it had been the intention to include all pensioners, the word "such" was entirely inappropriate, and should not have been employed. But it has been used, and by every principle of grammatical construction it refers back to the clauses of the section which designate and describe a certain class of individuals. Had the word "such" been omitted from the section, it would have stood thus: "But all pensioners shall surrender their pensions." The sentence might then have meant what the defendants contend it means. But unless we argue the word "such" out of the statute, it must stand and have significance. Interpreted by the context, it refers to those pensioners who have not contributed, and not indiscriminately to all.

The construction given to these statutes by the Commissioner of Pensions was in accordance with these views when this case arose, and the interpretation by that officer is entitled to much weight. In the case of the United States vs. Moore, the Supreme Court said: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." Edwards vs. Darby, 12 Wheat., 210; United States vs. The State Bank, 6 Pet., 29; United States vs. McDaniel, 7 id., 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." 95 U. S., 763.

If, through inadvertence or precipitancy, as is claimed, Congress has thought proper, in fit and unmistakable terms, to provide for the gallant and patriotic men who have become disabled in the military service of the country a home towards the support of which their slender means have contributed, and at the same time to continue to pay their pensions, it is for Congress, and not for the courts, to repair the error complained of, and to retrench its inconsiderate liberality. For us to do so were to transcend the judicial prerogative and to invade the constitutional sphere of an independent and co-ordinate department of the government.

It is therefore ordered, adjudged, and decreed that there be judgment in favor of the claimant as prayed for.

V.—*Dissenting opinion.*

DRAKE, Ch. J., dissenting:

I am unable to concur with the majority of the court in the judgment just rendered, and deem the main question in the case of sufficient importance to justify a full expression of the grounds of my dissent.

Whether the claimant shall recover the small sum of $264.60 is of little moment to any but himself; but aback of that lies a new and very important question as to the force and effect of the Revised Statutes, promulgated by the act of June 22, 1874, "to revise and consolidate the statutes of the United States in force on the first day of December, anno Domini one thousand eight hundred and seventy-three."

What those Revised Statutes were intended by Congress to
11 embrace is not only expressed in the title of that act, but also in its section 5595, in these words:

"The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress,

sary requisitions from time to time as the same shall be made upon him. This all means that the contractor instead of the Government should provide for storing and keeping the ice at the points of delivery, and retail it out as it should be needed. This was never contemplated by the parties when the contract was made—it is not in the bond. It is directly at variance with the manifest spirit and the terms of the contract, and yet we do not make it the basis for asking or recovering damages. We only refer to it, to show the bad faith of these Government officers, and how meanly and unjustly they were disposed to treat us.

What the appellants claim is the contract price of 17,232 tons of ice which they purchased at great expense under, as we say, the orders of the Government, and were fully prepared to deliver, and this upon the well recognized principle, that when one party to an executory contract puts an end to it, or to a part of it, by refusing to fulfil, the other party is entitled to the same amount that he would have received if he had fully performed, deducting therefrom the amount saved to him by not being required to perform fully.

As the Court of Claims has not reported nor found the amount saved to appellants, by not being required to perform the contract fully, it is unnecessary for us to trouble this Court with the figures and calculations under the evidence which establishes the fact that after deducting all the expense that would have been incurred in the completion of the contract, and making a reasonable allowance to the United States for the freedom from risk, care, trouble and loss, that would have attended its fulfilment, there would have still been a large balance left for the appellants—at least enough to compensate them for the expense of the purchase of said ice and the ~~just~~ part performance of said contract, which was

done by them in good faith under the orders of the United States.

In the present condition of the record this Court, if it finds sufficient grounds for a reversal, will have to remand the cause for a proper judgment below.

In doing so we ask the Court also to indicate the rule of damages that should obtain under the facts of this case. This we ask because of the singular view which the dissenting judges took of this subject in this case, limiting our recovery to actual damages sustained by us on ten thousand tons of ice lost at Lake Pepin, instead of a recovery for the damages sustained by us and the whole breach.

We refer to the authorities cited under the point in the brief.

We submit the case with confidence that the Court will reverse the judgment of the Court of Claims, for the errors assigned and order judgment for the appellants.

JOHN B. SANBORN,
R. P. LOWE
Attorneys For Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1878.

JOSEPH W. PARISH & CO., *for the use of* JOSEPH W. PARISH,
Appellant,
vs.
THE UNITED STATES,
Appellee.

No. 720.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR APPELLANT.

JOHN B. SANBORN,
R. P. LOWE,
Counsel.

Pioneer Press.

In the Supreme Court of the United States.

JOSEPH W. PARISH & CO. FOR THE USE OF JOSEPH W. PARISH,

Appellants,

vs.

THE UNITED STATES,

Appellee.

I.

STATEMENT OF THE CASE—QUESTIONS INVOLVED AND MANNER IN WHICH THEY ARE RAISED.

In January, 1863, at Washington, D. C., Henry Johnson, Medical Storekeeper United States Army and Acting Medical Purveyor, advertised for proposals for ice for the medical and hospital purposes of the army until the 1st day of January, 1864, at St. Louis, Cairo, Memphis and Nashville, Tennessee, and other points. The appellants were bidders, and their bid for the four places named was accepted by said Johnson, and on the 5th of March following articles of agreement were signed by the appellants and said Johnson, in which the appellants agreed to deliver to the United States, at the points specified, the whole amount of ice required to be consumed during the remainder of the year 1863; and the

said acting purveyor stipulated that the appellnnts should receive per ton for ice delivered at Nashville $25 per ton; for ice delivered at Memphis and Cairo, $20 per ton; and for ice delivered at St. Louis, $16 per ton; and the United States recognized said contract as valid.

R. C. Wood was Assistant Surgeon General, acting in that official capacity at St. Louis before and after the 25th day of March, 1863.

Henry Johnson, on the 5th of March, 1863, was medical storekeeper, U. S. A., and, at the time stated, on duty as acting medical purveyor at Washington, D. C.

Joseph B. Brown was, on the 25th day of March, 1863, and during the months of April and May, 1863, a surgeon, United States Army, with the rank of major, and on duty in the office of the Assistant Surgeon General, United States Army, at St Louis, Mo.

The following instructions were given by the Surgeon General of the United States to said Assistant Surgeon General R. C. Wood, with others, long prior to March 25, 1863, viz.:

"The President is desirous that the sick should be cared for, as far as possible, within the limits of the commands to which they belong.

"You are authorized to approve requisitions of medical purveyors on the purchasing purveyors, a duplicate of the requisition being sent to this office in order that it may be furnished by a purveyor to be designated by the Surgeon General. In case of necessity, you may yourself order the immediate purchase of such medicines and other supplies as may be required, informing me as soon as possible of your action.

"Of course, it is impossible for me, even if it were desirable, to ask your attention to subjects which, of course, will, in the ordinary routine of business, come under your notice.

"Your large experience and devotion to the army and the corps are ample guarantees that the important

duty assigned to you will be faithfully and efficiently performed.

"The States of Indiana, Illinois, Kentucky, Tennessee, Missouri, Kansas, Iowa, Wisconsin, Minnesota, and Michigan, with such parts of Alabama, Mississippi, and Arkansas as are occupied by the troops lately under Major General Halleck's immediate command, are those over which your jurisdiction will extend."

On the 25th day of March, 1863, the Assistant Surgeon General at St. Louis caused the following order to be made and served upon the appellants, viz.:

"ASSISTANT SURGEON GENERAL'S OFFICE,
"ST. LOUIS, MISSOURI, March 25, 1863.

"*Messrs. J. W. Parish & Co.*,

"GENTLEMEN: I am instructed by the Assistant Sur-
" geon General to direct that the ice you have agreed to
" deliver at the points designated in your contract shall
" be distributed in the following quantities: At St. Louis,
" 5000 tons; at Cairo, 5000 tons; at Memphis, 10,000
" tons; at Nashville 10,000 tons, making the total 30,000
" tons which you have contracted to deliver. The ice to
" be delivered at Nashville and Memphis is for the use of
" the sick of the armies in the field and should be fur-
" nished without delay.

"Very respectfully, your ob't servant,
"JOSEPH B. BROWN,
"Surgeon U. S. Army.

"By order of the Assistant Surgeon General."

Prior to the delivery to the said Parish of the above order of March 25, 1863, the said Parish had purchased for delivery under the contract sued on 8100 tons of ice; and after the delivery of said letter to him he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2d day of April, 1863, apprised of the order of Surgeon General Hammond, of March 31, he had purchased, or contracted for the purchase of, 23,000 tons of ice.

The order of Surgeon General Hammond was in the following words, viz.:

"SURGEON GENERAL'S OFFICE,
March 31, 1863.

"Parish & Company have not contracted for 30,000 "tons of ice. Suspend the order you gave him.

"W. A. HAMMOND,
"Surgeon General.

"COL. R. C. WOOD,
"Ass't Surgeon General U. S. Army, St. Louis."

The whole amount of ice which was received by the officers of the Government under said contract, omitting fractions, was as follows:

	Tons.
At Saint Louis,	4,174
At Cairo,	1,388
At Memphis,	6,456
At Nashville,	750
Total,	12,768

For this quantity the said Parish has been paid the contract prices.

Of the 23,000 tons of ice purchased by said Parish between the 25th of March and the 2d of April, 1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi River was such that, with a sufficiency of steamboats and barges present there in the early part of that month, that quantity might have been transported southward to St. Louis and the other places at which the said Parish was required by said contract to furnish said ice; and after that month the water in said river became and continued so low that the said ice could not be so transported southward, and the same melted and was lost to the said Parish.

The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid.

Parish was orally informed of the suspension of said order on the 2d of April, 1863.

This order of suspension continued standing throughout the year without change.

The Court of Claims has not found the precise amount of damages sustained by the appellants by reason of the suspension of the order of March 25, 1863, but find enough to show that it was very great. In fact, the Lake Pepin ice cost and was paid for at from four to six dollars per ton, and all the other at a higher rate. So that the appellants, by the refusal of the Government to receive said ice as ordered, actually lost one hundred thousand dollars, with no allowance for time, risk, expenses, interest, &c.

Failing to obtain any redress from the Medical Department for this great injury, the appellants appealed to Congress for relief, and on page 3 of the transcript will be found an act passed by that body approved May 31, 1872, authorizing the appellants to sue the United States in the Court of Claims to recover such damages as they may have sustained by reason of the alleged violation of the contract in the refusal of the Government to receive the entire 30,000 tons named in the said contract.

Accordingly, under this act, the appellants brought their suit, and in their amended petition, on which they seek to recover, found on page 8, 9, 10, 11 and 12 of the transcript, are set out substantially the foregoing facts, alleging additionally thereto their loyalty during the war, and the amount they were entitled to recover, namely. $251,887.72.

To this petition the defendant interposed three pleas.

1. A denial of the facts therein set forth;
2. A special plea of *res adjudicata;*
3. The statute of limitation.

These two last pleas were traversed by replications, and afterwards abandoned by the Attorney General and are now laid out of the case. The cause was tried upon the issue made by the first plea under the evidence produced on both sides, and on due consideration of the premises three of the five judges, (two dissenting) found for the defendant, and ordered that the claimants' petition be dismissed, because the letter or order of Assistant Surgeon General Wood, was no part of the contract and imposed no liability on the Government; and because the Assistant Surgeon General at St. Louis, had no authority to order said contractors to furnish any definite or fixed amount of ice or medical supplies, although their contract had been made with an officer of inferior rank to furnish all supplies of that class needed.

From this judgment the complainants have appealed to this court.

II.

ASSIGNMENT OF ERRORS.

The said Joseph W. Parish & Co., say that the Court of Claims, in giving the judgment aforesaid, contained in the record aforesaid, that their petition be dismissed, committed manifest error in this, to wit: That the said Court of Claims of the United States, after finding that the said contract of March 5, 1863, had been made and entered into between the appellants and the United States, as in the petition of the appellants is alleged, and that the order of the Assistant Surgeon General, of date March 25, 1863, to the appellants, to furnish 30,000 tons

of ice and 20,000 without delay had been made, as in said petition alleged, and that the appellants thereafter and before they were, on the 2nd day of April, 1863, apprised of the aforesaid order of Surgeon General Hammond, of March 31st, had purchased or contracted for the purchase of twenty-three thousand tons of ice, in addition to eight thousand one hundred tons owned by them on the day of the date of said order, and that said order was suspended on April 2, 1863, by the United States; and the United States received during said year 12,768 tons only, and that ten thousand tons of said 23,000 tons were purchased at a point from which it could be transported during the month of April only, and was wholly lost to the appellants; did find and conclude and adjudge that the appellants could not, as matter of law, recover damages sustained by them in the premises from the United States.

And there is also manifest error in this: That the said Court of Claims after finding that R. C. Wood was Assistant Surgeon General of the United States Army duly assigned to duty in St. Louis, with jurisdiction over the States of Missouri, Illinois, Kentucky, Tennessee and other Western States, did find and adjudge and conclude that he had not authority to order for and designate for the United States, any definite or fixed quantity of ice or hospital supplies for the immediate use of the sick of the armies in the field. And that such an order given by said Assistant Surgeon General to contractors with the United States, to furnish the medical supplies ordered, acted upon by said contractors to their damage, creates no obligation in law on the part of the United States to pay said damages.

And there is manifest error in this, that the said Court of Claims did dismiss the petition of the said appellants and deny to them the relief prayed.

And also in this, that the Court of Claims did give

the judgment aforesaid against the appellant in favor of the United States; whereas, by the law of the land, the same should have been given in favor of the said appellants and against the United States. Wherefore, and for other errors in the record and proceedings apparent, the appellants pray that the said judgment may be reversed, and judgment may be ordered in favor of said appellants against the United States, as prayed for in said petition.

III.

BRIEF.

I. The official acts and orders of an officer of the Medical Department of the Army, of the rank of Colonel, and Assistant Surgeon General, who has been assigned to duty, and given the general supervision of all medical affairs in a territorial department, comprising many States, are, in the absence of fraud, unless in violation of law, obligatory upon contractors and all employees and subordinates of that bureau in said territorial department, and hence are of lawful and binding force upon the United States. All his lawful official orders and acts, are the orders and acts of all his superiors, and of the United States, and the United States are bound and concluded thereby. The authority of the Assistant Surgeon General to fix and determine amounts, was as full and complete as the authority of the Acting Medical Purveyor to fix the price and the action of both being within the sphere of their authority are the acts of the United States.

21st Article of War, Revised Statutes, page 231.
Allen vs. Blunt, 3 Story, 742.
United States vs. Anedento, 6 Peters, 691.
Wilks vs. Dinsman, 7 Howard, 88.

The long list of authorities holding acts of officers *de facto*, valid so far as the rights of the public or third persons having an interest in such acts are concerned, might, perhaps, with propriety be cited. But the rule is too well settled for comment or authority.

II. The appellants, being under a contract with the United States to furnish all the ice required at the points named in the contract for the prices specified therein, as the same might be needed, upon receiving an order from the Assistant Surgeon General in charge of that department, who was the officer of the United States, and of the Medical Department highest in rank therein, to furnish specific amounts at certain points under said contract, were immediately under obligation to the United States to furnish that specific amount at the price designated in the contract and at the time and place designated in the order, and having entered upon the performance of this contract, and expended large sums of money in part performance thereof, and having been prevented from performing the same fully by the respondent, are entitled to recover, as damages, the difference between what the performance would have cost them and the price which the respondents had agreed to pay.

Ganson et al. vs. Madigan, 13 Wis., 67.
Barrow vs. Arnaud, 82 B., 595, 610.
Phillpots vs. Evans, 5 M. & W., 475.
Leigh vs. Patterson, 8 Taunt., 540.
Boorman vs. Nash, 9 B. & C., 145.
Gordon vs. Norris, 49 N. H., 376.
Thompson vs. Alger, 12 Met., 428.
Allen vs. Jarvis, 20 Conn., 38.
Orr vs. Bigelow, 14 N. Y., 556.
Dana vs. Fiedler, 2 Kernan, 41.
Ballentine vs. Robinson, 46 Penn. St., 177.

Whitmore vs. Coats, 14 Mo., 9.
Northup vs. Cook, 39 Mo., 208.
Haines vs. Tucker, 50 N. H., 307.
Griswold vs. Sabin, 51 N. H., 147.
Chitty on Contracts, 11 Ed., p. 1331.
Sedgwick on Damages, 5 Ed., pp. 315, 316.
Speed vs. United States, 8 Wall., 77.
Phil., Wil. & Balt. R.R. Co. vs. Hayward, 13 How., S. C. R., 344.
Masterson vs. The Mayor, &c., of Brooklyn, 7 Hill, p. 61.
Wilder's case, 5th Nott. & H., 469.

The general principle laid down in these cases is, that the rule of damages, when the Government has violated its contract, as in this case, is the difference between what the contractors would have received under the contract if it had been fully executed according to its terms, and the amount saved to them by the release from the care, trouble, risk, responsibility and expense attending the full execution of the contract.

ARGUMENT.

The first noticeable feature in the disposition of this case in the court below is the fact that the claimants were dismissed out of that court upon a question not raised in any way by the pleadings therein, nor yet even suggested or insisted upon by the counsel representing the Government. It was a suit at law to recover damages for the violation of a contract. The facts upon which it was based were fully set out in the petition, including the order of the Assistant Surgeon General, specifying the whole amount of ice (30,000 tons) which would be required to be consumed under the contract. The defendants simply denied the existence of the facts pleaded, thereby admitting a cause of action if they were

true. Their truth was abundantly established by the evidence. And yet the plaintiffs below went out of court with their grievance unredressed; and upon a question *de hors* the record, raised by the court alone. It is submitted to the greater wisdom of this court, whether, under the circumstances, the appellants have ever had their day in court, in the true sense of the law, and whether this departure from the ordinary practice of trying causes upon the issue made, should be permitted.

2d. The majority of the court held that the order dated March 25th, 1863, at St. Louis, addressed to J. W. Parish & Co., from the Assistant Surgeon General's office, and fully set out on the second page of this brief, was issued without authority; formed no part of the contract between the parties; and imposed no liability on the Government, and the court said, upon these points, that as the claimants' case rested upon this order, their petition must be dismissed.

This ruling was erroneous. The validity of said order is the chief question for this court to decide. To reach a correct conclusion thereon, the circumstances under which it was issued, by whose authority, the nature and subject of the contract with which it stands connected, the two-fold character and object of the order itself, and the necessities of the case, must be considered.

The office of Assistant Surgeon General was created by statute, which does not undertake to prescribe the powers and duties of the office. There is nothing in the law establishing the office which makes it necessary that his acts as assistant shall all be ratified and approved by the Surgeon General before they shall be legal and effectual. The implication is, that as assistant he is to share in the execution of the duties and powers which devolve upon the Surgeon General himself; and when he does so within the limitation of the law, his acts are as

binding on the Government and as effectual at law as if they had been performed by the Surgeon General.

During the late war the medical and hospital department of the Army was divided into two geographical districts; the headquarters of one was at Washington, D. C., that of the other at St. Louis, Missouri. The Surgeon General, W. A. Hammond, presided over the former, whilst the Assistant Surgeon General, Col. R. C. Wood, did so over the latter; the boundaries of whose district will be seen defined in the last clause of the Surgeon General's letter of general instruction to the Assistant Surgeon, Wood, dated the 28th July, 1862, found on pages 14 and 15 of the transcript, and reads as follows:

"The States of Indiana, Illinois, Kentucky, Missouri, Kansas, Iowa, Wisconsin, Minnesota and Michigan, with such parts of Alabama, Mississippi and Arkansas, as are occupied by troops lately under Major General Halleck's immediate command, are those over which *your jurisdiction* will extend.

"Very respectfully, your obedient servant,
(Signed) "W. A. HAMMOND,
"*Surgeon General, U. S. A.*"

Now, whilst the Surgeon General had the general supervision of the entire field of this branch of the public service, yet in subordination to him his assistant was, during the war, charged with the duties of the office within the above described district, over which he was expressly told his jurisdiction extended; and thus he was constituted the agent of the Government, as well by necessary legal implication as by the express language of the above letter of instructions, which, among other things, in the fifth paragraph from the bottom, says:

"You are authorized to approve requisitions of medi-
"cal purveyors on the purchasing purveyors, a duplicate
"of the requisition being sent to this office, in order that

"it may be furnished by a purveyor to be designated by "the Surgeon General. In case of necessity, you may "yourself order the immediate purchase of such medi- "cines and other supplies as may be required, informing "me as soon as possible of your action."

In the military department, the powers and oftentimes the duties of officers are determined by their rank, and when it is considered that the rank of the Assistant Surgeon General was the second highest in the medical department, and that all other officers and attaches of the department were subordinate to him, and required by law to obey his commands under fearful penalties, it will not be thought strange that the appellants acted promptly upon his orders.

At the military hospitals during the war there was no sanitary agent more important or more needed than ice and the same clearly falls within the designation of hospital supplies or stores, and here is express authority from the Surgeon General himself to Col. Wood to order the purchase of the same, saying nothing of his implied powers under the law to do so. Whoever, therefore, doubts the power of the Assistant Surgeon General, within the scope of his official duties as such, to bind the Government by contract or otherwise, until his official acts are first approved by the Surgeon General, fails to comprehend the legal and official relations of these two officers, with their headquarters more than one thousand miles apart, or the extent and exigencies of the service, which made it necessary to have the country divided into two territorial divisions or jurisdictions, or the frequent emergencies of the service, where delay in supplying the needed hospital stores would be disastrous, and result in a dereliction of the medical service.

Now, it is true, that this ice contract was entered into at Washington, by the Acting Medical Purveyor; but it was to be executed in the Mississippi Valley, within the

jurisdiction and supervision of Col. Wood, the Assistant Surgeon General, of superior rank. The contract itself specified no other quantity to be supplied than the following, namely: "The whole amount of ice required to be consumed at each respective point and vicinity thereof during the remainder of the year." This omission to state the amount in weight or tons, so that the contractor could make the necessary preparation to deliver it as required, was left open, for the reason that the surgeons of the hospitals and the Assistant Surgeon General, from their previous two years' experience and greater knowledge, could furnish a more accurate estimate of the quantity that would be required than from any other quarter.

It was the third year of the war; many battles had been fought in the Southwest, and numerous hospitals had been established to provide for the treatment of the sick and wounded. The quantity of ice used in these hospitals the previous years furnished a reliable data for estimating the amount that would be needed the ensuing year. Col. Wood, availing himself of this information from the medical directors and purveyors under him, did notify in advance the parties under the contract, of the quantity of ice that would be required to be consumed at each of the four points named in the contract.

The contract by its terms was to be executed in Col. Wood's district. He was the head of that district, charged with the performance of the same class of duties as that of the Surgeon General himself, and it became his official duty to see that this contract was faithfully carried out by the contractors.

It is too plain for argument or discussion, that authority and power in the military service is vested by rank, and is exercised by virtue of rank solely.

Under the act of Congress referred to, the Assistant Surgeon General stood next in rank to the Surgeon

General; and when on duty in a territorial department, to which he had been duly assigned, in the absence of the Surgeon General, his authority in all matters pertaining to the medical department is supreme. If this is not so, then why is he assigned to a territorial department, with fixed territorial limits? Does not the executive authority of the United States say to all citizens and all men, by such an assignment within these limits, the whole power of the United States, that under the Constitution and laws is vested in any officer or department, will be exercised by the officer so assigned?

The assignments by the President of generals to the command of armies and departments, of quartermasters and commissaries to the positions of chiefs of these branches in armies or departments, illustrates this whole doctrine. Relative rank is relative authority and power; and orders given by the highest officer in rank, pertaining to a matter over which he exercises his control, is lawfully issued, and obligatory upon all subordinates until revoked. It is the order of the Government and sovereignty; and if advantages result, the Government obtains them, and if damages result in matters of contract from such causes, the Government must sustain them. In the crisis of battle the sovereign power of the whole nation, by loss of all officers of higher grade, may devolve upon a lieutenant, who may give orders involving the life or death of thousands of citizens.

The order, then, of the medical officer highest in rank in a territorial department to which he had been assigned, in all matters pertaining to his branch of the service, is, and in the very nature of things must be, conclusive upon the United States, and all subordinate officers, soldiers, contractors, and retainers of the army under him.

The sovereign power is vested somewhere in some officer in the territorial department which pertains to the matter of medical supplies. Where is it vested if not in the officer of highest rank?

Again, the Assistant Surgeon General was an officer of higher grade than the medical purveyor. Hence, the purveyor was subject to his orders; and if the Assistant Surgeon General could order the purveyor to purchase, could he not lawfully order a contractor with the purveyor to deliver specified amounts of supplies at certain times and places? For all these purposes, and these very purposes, he was the embodiment of the United States in that department. Otherwise he had no functions there.

The United States had agreed to pay for so much ice as should be needed, acting by and through Henry Johnson, medical storekeeper and acting medical purveyor of the army: and the United States then designated an amount that would actually be needed by and through the Assistant Surgeon General, and the appellants prepared to furnish the same. The United States then informed the contractors that they needed so much, and the contract was complete between the parties for that amount.

Thus far we have been discussing the validity of that part of the order found on pages 9 and 10 of the transcript, which states the quantity of ice which the contractors had agreed to deliver, and how the same should be distributed, to the effect among other things that 10,000 tons each must be delivered at Nashville and Memphis. We now call attention to the clause of the same order which reads as follows:

"The ice to be delivered at Nashville and Memphis is "for the use of the sick of the armies in the field, and "should be furnished *without delay*."

This part of the order is simply a requisition for ice, made under the contract. Will it be said that the Assistant Surgeon General had not the power even to make

a requisition on the contractors for the ice they had agreed to furnish? The majority of the court below so held when they pronounced this whole order null and void for want of power on the part of the Assistant Surgeon to make it, and yet here was a call for the immediate delivery of 20,000 tons of ice, at two of the points specified in the contract, and after a little upwards of 7000 tons had been delivered under this requisition at these two points the Government refused to receive any more, leaving some 13,000 tons on the hands of the contractors, which subsequently was a total loss to them. We insist that we have shown the legal competency of Col. Wood to make this order, that the same was binding upon the Government, and that the court below manifestly erred in deciding otherwise.

3d. The next inquiry is, what transpired under this contract, how was the same observed by the parties thereto, and what was the treatment which the contractors received at the hands of the defendants?

On page 17 of the record, the Court of Claims found the following facts, viz.: that prior to the 25th of March, 1863, the date of the order upon which we have been commenting, Parish, the contractor, had purchased for delivery, under the contract sued, 8100 tons of ice, and that after the delivery of said order to him, and before the 2d of April following, when he was first advised of the suspension order of General Hammond, he had purchased, or contracted to purchase, 23,000 tons more of ice; that 10,000 tons of this ice was purchased at Lake Pepin in Minnesota, and that in the month of April the stage of water in the Mississippi River was such that with a sufficiency of steamboats present at the early part of that month, that quantity might have been transported southward to St. Louis and the other places of which the said contractor was required by the said contract to furnish said ice. And after that, the water in said river

became and continued so low, that the said ice could not be so transported southward, and the same melted and was lost to the contractor. And on the same page the court further found that the said Parish, the contractor, *was prepared and willing to deliver the said* 30,000 *tons of ice* in conformity with the conditions and obligations of his said contract and the terms of said letter (order) of March 25th, 1863, of which the defendants had notice, but they would not nor did they receive more than 12,768 tons of the ice which was paid for, leaving 17,232 tons to melt on appellant's hands.

According to the facts here found, Parish, the claimant, had contracted for the whole amount of ice required to be furnished in the order of March 25th, 1863, and that too prior to his notification on the 2d of April, following, that the said order had been suspended by the Surgeon General, Hammond. And the court very truly found also that he was prepared to deliver the same in accordance with the terms of the contract, for upon this point the evidence was very full and clear that about the 1st of April of that year, Parish had purchased one boat and had engaged a fleet of boats and barges to go up and bring out the ice purchased at Lake Pepin early in April. The facts show that this was practicable, but the suspension order came and the boats were not sent up. Still Parish was prepared and ready to fulfill to the letter his contract. He had purchased all the ice required, at a heavy expenditure, he had made all the preparation for its delivery at a heavy outlay of money. There was nothing left for him to do except simply to deliver the ice. Now, at this juncture of the transaction the Surgeon General at Washington, suspends the order for 30,000 tons of ice, which suspension the Court find, on p. 18 of transcript, was continued unchanged and unmodified during the remainder of the year.

The court will, of course, note the distinction between

the suspension of a contract and the annulment thereof. The latter makes void and inoperative altogether, whilst the former means a temporary intermission, or to cease proceeding for a while, and clearly implies the power to make it.

The effect of this suspension was very disastrous to Parish, whilst it recognized the power to issue the order it held up its execution for further instructions. Of course, under these circumstances, Parish was not at liberty to dispose of this ice in any way to other parties to partially indemnify himself for his great expenditures in purchasing the same, but was bound to hold on to it, to take care of it as best he could, to transfer it to rented ice-houses in order to preserve it for any future requisition by the Government. This subjected him to great additional expense, and yet 17,232 tons of this ice was never called for nor would it be received, and proved an entire loss to the contractor, which was a clear breach of the contract.

And this was not the only breach and hardship to which Parish was subjected by the strange conduct of the Government officers. It will be seen by the last clause of the contract made at Washington under the superintendence of the Surgeon General, page 9, that it was the clear intent and understanding of the contracting parties that the Government was to receive this ice at the different points in large quantities or by the cargo, and store and keep the same in its own ice-houses. That clause of the contract reads as follows:

"It is further agreed that the said J. W. Parish & Co. "will allow three working days for discharging each "cargo at either one of the points before mentioned; "after that time damages to be allowed by the said "Henry Johnson, Medical Storekeeper United States "Army, as per charter party or bill of lading of the "vessel."

This clause of the contract was afterwards wholly ignored by the Government officers, and in lieu thereof the Surgeon General at Washington on or about the 3d of April, 1863, instructed the Assistant Surgeon General at St. Louis to advise the contractor (which he did, see page 18) second, to establish depots of ice for himself at St. Louis, Cairo, Memphis, and Nashville, to keep the same amply supplied at all times, so as to fill all necessary requisitions from time to time, as the same shall be made upon him. This all means that the contractor, instead of the Government, should provide for the storing and keeping the ice at the points of delivery, and retail it out as it should be needed. This was never contemplated by the parties when the contract was made—it is not in the bond. It is directly at variance with the manifest spirit and the terms of the contract, and yet we do not make it the basis for asking or recovering damages. We only refer to it to show the bad faith of these Government officers, and how meanly and unjustly they were disposed to treat us.

What the appellants claim is the contract price of 17,232 tons of ice, which they purchased at great expense under, as we say, the orders of the Government, and were fully prepared to deliver, and this upon the well recognized principle, that when one party to an executory contract puts an end to it, or to a part of it, by refusing to fulfil, the other party is entitled to the same amount that he would have received if he had fully performed, deducting therefrom the amouut saved to him by not being required to perform fully.

As the Court of Claims has not reported nor found the amount saved to appellants, by not being required to perform the contract fully, it is unnecessary for us to trouble this court with the figures and calculations under the evidence which establishes the fact that after deducting all the expense that would have been incurred in

the completion of the contract, and making a reasonable allowance to the United States for the freedom from risk, care, trouble and loss, that would have attended its fulfillment, there would have still been a large balance left for the appellants—at least enough to compensate them for the expense of the purchase of said ice and the just performance of said contract, which was done by them in good faith under the orders of the United States.

In the present condition of the record, this court, if it finds sufficient grounds for a reversal, will have to remand the cause for a proper judgment below.

In doing so, we ask the court also to indicate the rule of damages that should obtain under the facts of this case. This we ask because of the singular view which the dissenting judges took of this subject in this case, limiting our recovery to actual damages sustained by us on ten thousand tons of ice lost at Lake Pepin, instead of a recovery for the damages sustained by us on the whole breach.

We refer to the authorities cited under the point in the brief.

We submit the case with confidence that the court will reverse the judgment of the Court of Claims for the errors assigned, and order judgment for the appellants.

JOHN B. SANBORN,
R. P. LOWE,
Attorneys for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1878.

JOSEPH W. PARISH & CO., *for the use of* JOSEPH W. PARISH,
Appellant,

vs.

THE UNITED STATES,
Appellee.

No.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR APPELLANT.

JOHN B. SANBORN,
R. P. LOWE,
Counsel.

Pioneer Press.

In the Supreme Court of the United Satets.

JOSEPH W. PARISH & CO., FOR THE USE OF JOSEPH W. PARISH,

Appellants,

vs.

THE UNITED STATES,

Appellee.

I.

STATEMENT OF THE CASE—QUESTIONS INVOLVED AND MANNER IN WHICH THEY ARE RAISED.

In January, 1863, at Washington, D. C., Henry Johnson, Medical Storekeeper United States Army and Acting Medical Purveyor, advertised for proposals for ice for the medical and hospital purposes of the army until the 1st day of January, 1864, at St. Louis, Cairo, Memphis, and Nashville, Tennessee, and other points. The appellants were bidders, and their bid for the four places named was accepted by said Johnson, and on the 5th of March following articles of

agreement were signed by the appellants and said Johnson, in which the appellants agreed to deliver to the United States, at the points specified, the whole amount of ice required to be consumed during the remainder of the year 1863; and the said acting purveyor stipulated that the appellants should receive for ice delivered at Nashville $25 per ton; for ice delivered at Memphis and Cairo, $20 per ton; and for ice delivered at St. Louis, $16 per ton; and the United States recognized said contract as valid.

R. C. Wood was Assistant Surgeon General, acting in that official capacity at St. Louis before and after the 25th day of March, 1863.

Henry Johnson on the 5th of March, 1863, was medical storekeeper, U. S. A., and at the time stated, on duty as acting medical purveyor at Washington, D. C.

Joseph B. Brown was, on the 25th day of March, 1863, and during the months of April and May, 1863, a surgeon, United States Army, with the rank of major, and on duty in the office of the Assistant Surgeon General, United States Army, at St. Louis, Mo.

Tht following instructions were given by the Surgeon General of the United States to said Assistant Surgeon General R. C. Wood, with others, long prior to March 25, 1863, viz.:

"The President is desirous that the sick should be cared for, as far as possible, within the limits of the commands to which they belong.

"You are authorized to approve requisitions of medical purveyors on the purchasing purveyors, a duplicate of the requisition being sent to this office in order that it may be furnished by a purveyor to be designated by the Surgeon General. In case of necessity, you may yourself order the

immediate purchase of such medicines and other supplies as may be required, informing me as soon as possible of your action.

"Of course it is impossible for me, even if it were desirable, to ask your attention to subjects which, of course, will, in the ordinary routine of business, come under your notice.

"Your large experience and devotion to the army and the corps are ample guarantees that the important duty assigned to you will be faithfully and efficiently performed.

"The States of Indiana, Illinois, Kentucky, Tennessee Missouri, Kansas, Iowa, Wisconsin, Minnesota, and Michigan, with such parts of Alabama, Mississippi, and Arkansas as are occupied by the troops lately under Major General Halleck's immediate command, are those over which your jurisdiction will extend."

On the 25th day of March, 1863, the Assistant Surgeon General at St. Louis caused the following order to be made and served upon the appellants, viz.:

"ASSISTANT SURGEON GENERAL'S OFFICE,
"ST. LOUIS, MISSOURI, March 25, 1863.

"*Messrs. J. W. Parish & Co.,*

"GENTLEMEN: I am instructed by the Assistant Surgeon "General to direct that the ice you have agreed to deliver "at the points designated in your contract shall be distri- "buted in the following quantities: At St. Louis, 5000 tons; "at Cairo, 5000 tons; at Memphis, 10,000 tons; at Nashville "10,000 tons, making the total 30,000 tons which you have "contracted to deliver. The ice to be delivered at Nashville "and Memphis is for the use of the sick of the armies in "the field and should be furnished without delay.

"Very respectfully, your ob't servant,
"JOSEPH B. BROWN,
"Surgeon U. S. Army.

"By order of the Assistant Surgeon General."

Prior to the delivery to the said Parish of the above order of March 25, 1863, the said Parish had purchased for delivery under the contract sued on 8100 tons of ice; and after the delivery of said letter to him he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2d day of April, 1863, apprised of the order of Surgeon General Hammond, of March 31, he had purchased, or contracted for the purchase of, 23,000 tons of ice.

The order of Surgeon General Hammond was in the following words, viz.:

"SURGEON GENERAL'S OFFICE,
March 31, 1863.

"Parish & Company have not contracted for 30,000 tons of ice. Suspend the order you gave him.

"W. A. HAMMOND,
"Surgeon General.

"COL. R. C. WOOD,
"Ass't Surgeon General U. S. Army, St. Louis."

The whole amount of ice which was received by the officers of the Government under said contract, omitting fractions, was as follows:

	Tons.
At Saint Louis	4,174
At Cairo	1,388
At Memphis	6,456
At Nashville	750
Total	12,768

For this quantity the said Parish has been paid the contract prices.

Of the 23,000 tons of ice purchased by said Parish between

the 25th of March and the 2d of April, 1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi River was such that, with a sufficiency of steamboats and barges present there in the early part of that month, that quantity might have been transported southward to St. Louis and the other places at which the said Parish was required by said contract to furnish said ice; and after that month the water in said river became and continued so low that the said ice could not be so transported southward, and the same melted and was lost to the said Parish.

The said Parish was prepared and willing to deliver the said 30,000 tons of ice in comformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid.

Parish was orally informed of the suspension of said order on the 2d of April, 1863.

This order of suspension continued standing throughout the year without change.

The Court of Claims has not found the precise amount of damages sustained by the appellants by reason of the suspension of the order of March 25, 1863, but find enough to show that it was very great. In fact, the Lake Pepin ice cost and was paid for at from four to six dollars per ton, and all the other at a higher rate. So that the appellants, by the refusal of the Government to receive said ice as ordered, actually lost one hundred thousand dollars, with no allowance for time, risk, expenses, interest, &c.

Failing to obtain any redress from the Medical Department for this great injury, the appellants appealed to Congress

for relief, and on page 3 of the transcript will be found an act passed by that body approved May 31, 1872, authorizing the appellants to sue the United States in the Court of Claims to recover such damages as they may have sustained by reason of the alleged violation of the contract in the refusal of the Government to receive the entire 30,000 tons named in the said contract.

Accordingly, under this act, the appellants brought their suit, and in their amended petition, on which they seek to recover, found on page 8, 9, 10, 11 and 12 of the transcript, are set out substantially the foregoing facts, alleging additionally thereto their loyalty during the war, and the amount they were entitled to recover, namely, $251,887.72.

To this petition the defendant interposed three pleas.

1. A denial of the facts therein set forth;
2. A special plea of *res adjudicata:*
3. The statute of limitation.

These two last pleas were traversed by replications, and afterwards abandoned by the Attorney General and are now laid out of the case. The cause was tried upon the issue made by the first plea under the evidence produced on both sides, and on due consideration of the premises three of the five judges (two dissenting) found for the defendant, and ordered that the claimants' petition be dismissed, because the letter or order of Assistant Surgeon General Wood, was no part of the contract and imposed no liability on the Government; and because the Assistant Surgeon General at St. Louis, had no authority to order said contractors to furnish any definite or fixed amount of ice or medical supplies, although their contract had been made with an officer of inferior rank to furnish all supplies of that class needed.

From this judgment the complainants have appealed to this court.

II.

ASSIGNMENT OF ERRORS.

The said Joseph W. Parish & Co. say that the Court of Claims, in giving the judgment aforesaid, contained in the record aforesaid, that their petition be dismissed, committed manifest error in this, to-wit: That the said Court of Claims of the United States, after finding that the said contract of March 5, 1863, had been made and entered into between the appellants and the United States, as in the petition of the appellants is alleged, and that the order of the Assistant Surgeon General, of date March 25, 1863, to the appellants, to furnish 30,000 tons of ice, and 20,000 tons without delay, had been made, as in said petition alleged; and that the appellants thereafter and before they were, on the 2nd day of April, 1863, apprised of the aforesaid order of Surgeon General Hammond, of March 31st, had purchased or contracted for the purchase of twenty-three thousand tons of ice, in addition to eight thousand one hundred tons owned by them on the day of the date of said order, and that said order was suspended on April 2, 1863, by the United States; and the United States received during said year 12,768 tons only, and that ten thousand tons of said 23,000 tons were purchased at a point from which it could be transported during the month of April only, and was wholly lost to the appellants; did find and conclude and adjudge that the appellants could not, as matter of law, recover damages sustained by them in the premises from the United States.

And there is also manifest error in this: That the said Court of Claims, after finding that R. C. Wood was Assistant Surgeon General of the United States Army duly assigned to duty in St. Louis, with jurisdiction over the States of Missouri, Illinois, Kentucky, Tennessee and other Western States, did find and adjudge and conclude that he had not authority to order for and designate for the United States, any definite or fixed quantity of ice or hospital supplies for the immediate use of the sick of the armies in the field. And that such an order given by said Assistant Surgeon General to contractors with the United States, to furnish the medical supplies ordered, acted upon by said contractors to their damage, creates no obligation in law on the part of the United States to pay said damages.

And there is manifest error in this, that the said Court of Claims did dismiss the petition of the said appellants and deny to them the relief prayed.

And also in this, that the Court of Claims did give the judgment aforesaid against the appellant in favor of the United States; whereas, by the law of the land, the same should have been given in favor of the said appellants and against the United States. Wherefore, and for other errors in the record and proceedings apparent, the appellants pray that the said judgment may he reversed, and judgment may be ordered in favor of said appellants against the United States, as prayed for in said petition.

III.

BRIEF.

I. The official acts and orders of an officer of the Medical Department of the Army, of the rank of Colonel, and Assistant Surgeon General, who has been assigned to duty, and given the general supervision of all medical affairs in a territorial department, comprising many States, are, in the absence of fraud, unless in violation of law, obligatory upon contractors and all employes and subordinates of that bureau in said territorial department, and hence are of lawful and binding force upon the United States. All his lawful official orders and acts are the orders and acts of all his superiors, and of the United States, and the United States are bound and concluded thereby. The authority of the Assistant Surgeon General to fix and determine amounts, was as full and complete as the authority of the Acting Medical Purveyor to fix the price, and the action of both being within the sphere of their authority are the acts of the United States.

21st Article of War, Revised Statutes, page 232; 63d Article of War, page 236.

Allen vs. Blunt, 3 Story, 742.

United States vs. Anedento, 6 Peters, 691.

Wilks vs. Dinsman, 7 Howard, 88.

Merchants' Bank vs. State Bank, 10th Wallace, page 644-5.

The long list of authorities holding acts of officers *de facto* valid so far as the rights of the public or third persons having an interest in such acts are concerned, might, perhaps, with propriety be cited. But the rule is too well settled for comment or authority.

II. The appellants, being under a contract with the United States to furnish all the ice required at the points named in the contract for the prices specified therein, as the same might be needed, upon receiving an order from the Assistant Surgeon General in charge of that department, who was the officer of the United States, and of the Medical Department highest in rank therein, to furnish specific amounts at certain points under said contract, were immediately under obligation to the United States to furnish that specific amount at the price designated in the contract and at the time and place designated in the order, and having entered upon the performance of this contract, and expended large sums of money in part performance thereof, and having been prevented from performing the same fully by the respondent, are entitled to recover, as damages, the difference between what the full performance would have cost them in addition to the amount expended by them prior to the date of the order of suspension and the price which the respondents had agreed to pay upon full performance.

Ganson et al. vs. Madigan, 13 Wis., 67.
Barrow vs. Arnaud, 82 B., 595, 610.
Phillpots vs. Evans, 5 M. & W., 475.
Leigh vs. Patterson, 8 Taunt., 540.
Boorman vs. Nash, 9 B. & C., 145.
Gordon vs. Norris, 49 N. H., 376.
Thompson vs. Alger, 12 Met., 428.
Allen vs. Jarvis, 20 Conn., 38.
Orr vs. Bigelow, 14 N. Y., 556.
Dana vs. Fiedler, 2 Kernan, 41.
Ballentine vs. Robinson, 46 Penn. St., 177.
Whitmore vs. Coats, 14 Mo., 9.
Northup vs. Cook, 39 Mo., 208.

Haines vs. Tucker, 50 N. H., 307.
Griswold vs. Sabin, 51 N. H., 147.
Chitty on Contracts, 11 Ed., p. 1331.
Sedgwick on Damages, 5 Ed., pp. 315, 316.
Speed vs. United States, 8 Wall., 77.
Phil., Wil. & Balt. R. R. Co. vs. Hayward, 13 How., S. C. R., 344.
Masterson vs. The Mayor, &c., of Brooklyn, 7 Hill, p. 61.
Wilder's case, 5th Nott & H., 469.

The general principle laid down in these cases is, that the rule of damages, when the Government has violated its contract, as in this case, is the difference between what the contractors would have received under the contract if it had been fully executed according to its terms, and the amount saved to them by the release from the additional care, trouble, risk, responsibility and expense necessary to the full execution of the contract.

ARGUMENT.

In the consideration of this case, it is essential that the following facts, copied literally from the record, be kept constantly in view by the court, viz.:

FACTS AS THEY APPEAR IN THE RECORD.

V. "On the 25th day of March, 1863, Joseph B. Brown, by instruction of Assistant Surgeon General Wood, issued the following order.

"ASSISTANT SURGEON GENERAL'S OFFICE,
"ST. LOUIS, MO., March 25, 1863.

"*Messrs. J. W. Parish & Co.,*

"GENTLEMEN: I am instructed by the Assistant Surgeon General to direct that the ice which you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities, viz:

"At Saint Louis	5,000 tons.
"At Cairo	5,000 tons.
"At Memphis	10,000 tons.
"At Nashville	10,000 tons.

"Making the total of 30,000 which you have contracted to deliver. *The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay.*

"Very respectfully, your obedient servant,
"By order of the Assistant Surgeon General:
"(Signed,) JOSEPH B. BROWN,
"Surgeon United States Army.

"A copy of this order being received at the Surgeon General's Office, the following telegram and letter were sent to Assistant Surgeon General Wood:

"SURGEON GENERAL'S OFFICE,
"March 31, 1863.

"Parish & Co. have not contracted for 30,000 tons of ice. Suspend the order you gave him.
"(Signed,) W. A. HAMMOND,
"Surgeon General.

"Col. R. C. WOOD,
"Asst. Surg. Gen. U. S. A., St. Louis.

"SURGEON GENERAL'S OFFICE,
"WASHINGTON, D. C., March 31, 1863.

"SIR: Your communication of the 25th instant to J. W. Parish & Co. in regard to the quantities of ice to be delivered at the different points for which they contract, forwarded to this office for the information of the Surgeon General, has been received.

"I am instructed to inform you that the contract with Parish & Co. was made for such quantities as might be needed; and that the ice should be ordered from them, from time to time, to different points, in lots of a few hundred tons, as needed.

"Very respectfully, your obedient servant,
"C. H. ALDEN,
"Assistant Surgeon U. S. A.

"COL. R. C. WOOD,
"Asst. Surg. Gen., St. Louis, Mo.

"In this connection the following telegram was sent, but not addressed to the claimant at his residence or place of business:

"ASSISTANT SURGEON GENERAL'S OFFICE.
ST. LOUIS, MO., March 31, 1863.

"*To J. W. Parish & Co., care C. H. Wicker & Co., Chicago, Ill.*:

"I am instructed by the Surgeon General to suspend the order I have given you till further instructions are given from him.

"R. C. WOOD,
"Assistant Surgeon General.

"It does not appear that this dispatch ever reached the claimants, or either of them. The claimant, Parish, did have knowledge of this notice by oral information from the Assistant Surgeon General at Saint Louis, on the 2d of April following.

VI. "Prior to the delivery to the said Parish of Joseph B. Brown's letter of March 25th, 1863, set forth in finding V, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and after the delivery of said letter to him, he set about purchasing ice for delivery in pursuance of said letter; *and thereafter, and before he was, on the 2d of April*, 1863, *apprised of the aforesaid order of Surgeon General Hammond of March* 31, *he had purchased or contracted for the purchase of* 23,000 *tons of ice.*

VIII. "Of the 23,000 tons of ice purchased by said Parish between the 25th of March and the 2d of April, 1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi River was such that with a sufficiency of steamboats and barges present there in the early part of that month that quantity might have been transported southward to St. Louis, and the other places at which the said Parish was required by said contract to furnish ice; but the said Parish did not have steamboats and barges at said lake in that month to transport the ice which he had purchased there; and after that month the water in said river became and continued so low that the ice could not be so transported southward, and the same melted and was lost to the said Parish.

IX. "The said Parish was prepared and willing to deliver the said 30,000 *tons of ice in conformity with the conditions and obligations of his said contract, and the terms of said letter of March* 25, 1863, *of which the defendants had notice, but they would not, nor did, receive more than the* 12,768 *tons aforesaid.*"

In the immediate connection with the fact that the claimants were contractors in the medical department, and at Saint Louis, and with the order of March 25th, 1862, the sixty-third and twenty-first articles of war should be considered. They read as follows, viz.:

ARTICLE 63. "All retainers to the camp, and all persons

serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war.

ARTICLE 21. "Any officer or soldier who on any pretense whatever strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court martial shall direct.

The claimants, by the fact of being contractors and of special use to the army, brought themselves under that military jurisdiction which is derived from the common law of war. General Orders War Department No. 100, April 24th, 1863.

This order created no new law, but simply proclaimed what the laws of war were. Among other things said order proclaimed the following, viz.:

ARTICLE 50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, or *contractors*, if captured, may be made prisoners of war, and be detained as such.

Again from the same order:

ARTICLE 7. Martial law extends to property and to persons whether subjects of the enemy or aliens to that government. See 16. Act July 17. 1862 12 Statutes page 596.

It must be conceded that in time of war the officer highest in rank, assigned to the charge of a branch of the public service in a territorial department, is vested with all the power and authority conferred upon him by statute or derived from his rank and assignment to duty under or by virtue of the common law of war. The Assistant Surgeon General held the rank of Colonel in the Medical Department

of the Army. There were three officers only in that branch of the service that could exercise control over him, viz , the Surgeon General, Secretary of War and President of the United States. But the Assistant Surgeon General had been assigned to the command and management of a territorial department composed of many States.

"The States of Indiana, Illinois, Kentucky, Missouri, Kansas, Iowa, Wisconsin, Minnesota and Michigan, with such parts of Alabama, Mississippi and Arkansas, as are occupied by troops lately under Major General Halleck's immediate command, are those over which *your jurisdiction* will extend.

"Very respectfully, your obedient servant,
(Signed,) "W. A. HAMMOND,
"Surgeon General, U. S. A."

The law must surely presume that this assignment was made by all three of these his superiors. It must follow that all the powers vested in any one or all three of these officers pertaining to the medical department of the army, either by the statute law, or the common law of war, were by said rank and assignment vested in the Assistant Surgeon General in this department. Hence all officers and contractors connected with that department, stationed and on duty, or connected with that service in the said territorial department, were subject to the orders of said Assistant Surgeon General. He could order any of said officers to procure supplies or to enter into a contract for medical supplies, unless prohibited from so doing by his superiors. And he must have had the authority to order any contractor under a contract with the United States for the benefit of that department to furnish so much supplies of a given kind or class as should be needed

by the United States; to fix the amount required at any given time or place. Otherwise his assignment would have been a farce, and his limited authority been of no avail to the government in an emergency, or at any other time. But it is enough for the purposes of our argument that the Assistant Surgeon General had authority under some circumstances to fix the amount of medical supplies to be delivered, and determine the place and manner of storing the same. And can it be considered for one moment that he could not have responded to a requisition for ice by the commanders of the armies operating from Nashville and Memphis as the respective bases of supplies without first consulting the Surgeon General? On the other hand, had not the Surgeon General with unusual care provided a limited or fixed price to be paid for the ice, and left the question of quantity in every instance to the Assistant Surgeon General and his subordinates, who could be overruled by him on all matters of estimates. This seems to be the contract and the law of the case.

It cannot, then, be said that we beg the question, when we say that the order for thirty thousand tons was not ultra vires. Surely, this cannot be ultra vires, unless the amount ordered makes it such. If the Assistant Surgeon General had authority to order ice at all from these contractors, the fact that he ordered too much or too little cannot affect the case. Error in judgment is common with men in official position as well as out. But to say of a court that it had not jurisdiction of the subject matter because it has given judgment for too much or too little, would be absurd. It must be equally absurd to say the same of any officer who has authority to act at all upon the subject matter. Hence, we say, the power existed, and that there was nothing in the tran-

saction to excite suspicion of any defect or irregularity. Indeed, we claim there was none, and that a literal enforcement of the order of March 25th, would have saved to the defendant many millions of dollars.

The assignments by the President of generals to the command of armies and departments, of quartermasters and commissaries to the positions of chiefs of these branches in armies or departments, illustrates this whole doctrine. Relative rank is relative authority and power; and orders given by the highest officer in rank, pertaining to a matter over which he exercises his control, is lawfully issued, and obligatory upon all subordinates until revoked. It is the order of the government and sovereignty; and if advantages result, the government obtains them, and if damages result in matters of contract from such causes, the government must sustain them. In the crisis of battle the sovereign power of the whole nation, by loss of all officers of higher grade, may devolve upon a lieutenant, who may give orders involving the life or death of thousands of citizens.

The order, then, of the medical officer highest in rank in a territorial department to which he had been assigned, in all matters pertaining to his branch of the service, is, and in the very nature of things must be, conclusive upon the United States, and all subordinate officers, soldiers, contractors, and retainers of the army under him.

The sovereign power is vested somewhere in some officer in the territorial department which pertains to the matter of medical supplies. Where is it vested if not in the officer of highest rank?

The order of the 25th of March did not exempt the appellants from liability to furnish more than thirty thousand tons, but was an order to the contractors to furnish *so much*

of what they had agreed to furnish under their contract. The Assistant Surgeon General derived his power to order this *from his rank and assignment to duty in that territorial department.* A refusal to obey his orders by contractors to furnish medical supplies in that department, would have subjected them to trial by court-martial and to the punishment of death or such lesser punishment as the court-martial should determine. The Surgeon General did not limit the power of the Assistant Surgeon General in this behalf, before the contract was made, nor in his instructions. *The power and authority of the Assistant Surgeon General in a territorial department is all the power of the War Department,* except that power has been limited or taken away by previous instructions or orders.

Power and authority in a military officer must be sought in his rank and assignment to duty or command under the law creating the office. *Limitations of that power and authority in letters, instructions, or orders from superior orders.* An officer of the rank of colonel is detailed to make a recognoissance in force to develop the enemy's position. Has he the authority to fight a battle if attacked? Certainly, unless the orders of a superior officer making the detail have provided otherwise, when he must obey his orders. An officer of the medical department is detailed to take charge of a medical department in a certain designated territory. Has he the authority to provide needed supplies for his department? Certainly, he may detail any inferior officer of his department to act as medical purveyor, and order him to procure by contract, according to law, the supplies that in his judgment may be necessary, unless prohibited from doing so by the orders or instructions of his superior officer making the assignment.

In all such cases we submit that the voice of officers of such rank so assigned is the voice of the sovereign power, and their orders are the orders of the sovereign, and must be obeyed. And in this case we need go no further than this, viz., that any one connected with the service will certainly be justified and protected in obeying such orders, while disobedience may, and usually will, be attended with consequences the most serious.

It is true that the United States have no general agents; but have many agents, all clothed with some portion of the sovereign power.

The Floyd Acceptances, 7th Wallace, page 676.

The judges of the court determine the legal rights of men, and their decision is the decision of sovereign wisdom and power; and the decision of a judge of an inferior court having jurisdiction, is the decision of the superior court and of the government until appealed from and reversed, and will protect an executive officer carrying the same into effect and other persons acting upon it, during an appeal, if *no supersedeas* is entered. The military power is vested in the president and such inferior officers as he may from time to time appoint; and it must be held that the acts and orders of all these inferior officers, within the sphere and scope of their duties, are the acts and orders of the President of the United States, until revoked or modified by him, or some officer superior to the officer doing the act or issuing the order and in the same branch of the service or line of duty, and will protect the person acting upon them and be obligatory upon the United States until reversed.

Now apply the principle, that what this court has said has become axiomatic in the law of corporations, and to have been applied by this court with a firmness not surpassed by that of

any other in the land, viz.: "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corpoation is bound by the contract, although such *defect or irregularity in fact exists.*

If the contract can be *valid under any circumstances*, an innocent party, in such a case, has a right to presume their existence and the corporation is estopped to deny them."

Merchants Bank vs. State Bank, 10 Wallace, p. 644–5.

Now, conceding for the purposes of the argument that the above doctrine does not apply in its full length and breadth where a sovereign power is a party, still it must be conceded, that if the sovereign power has given authority to act at all in the premises to any person, and left to such person a discretion where and to what extent to act, then such doctrine is applicable to such a case. And such is the case at bar.

Consider a parallel case in any one of the other departments of the military establishment.

The Quartermaster General has made a contract fixing the rate to be paid for horses, saddles, harnesses, wagons, forage of all description, and all other quartermaster's supplies for a department or an army in the field during a current year. The contractor is known to the Assistant Quartermaster assigned to duty with the army or department. The assistant orders the contractor to furnish thirty thousand cavalry horses under his contract, and at the same time gives notice that "twenty thousand are for the use of the cavalry of the armies in the field, and must be furnished without delay." The contractor fearful of the effect upon the market value of horses of an order of such proportions, immediately

sets all his agencies at work to purchase, and in five days has purchased enough to fill the entire order. After this, immediately after it may be, the Quartermaster General disapproves the order of his subordinate, directs that it be suspended, and leaves all or the larger portion of these horses in the hands of the contractor the entire year, and refuses to take them at last. The Assistant Quartermaster, like an Assistant Surgeon assigned to duty with an army or department, has authority and it is his duty to provide all needful supplies for such army or department pertaining to his branch of the service. Is not the United States Government responsible for any loss such contractor may sustain by reason of the failure of the United States to take the horses so ordered? The officer making the order had authority to order some horses for the cavalry service. His authority was limited only by the necessities of the service, and of these necessities he has been made the judge by his rank and assignment to duty. But assume for the purposes of the argument that he has made an improper estimate of these necessities, and ordered too much or too many. In such a case who shall suffer? Shall it be the party who dealt with the agent in good faith, or the party who appointed an agent with the double authority of determining first what the necessities of the service were, and also of supplying by purchase or orders upon contractors those necessities. It seems to us that the law can have but one answer to the question. The principal, by conferring the rank upon the officer and making his assignment, has said to all the world this is my agent not only to procure and provide quartermaster's supplies for my army or department, but also to determine the amount needed, and where and when needed.

Floyd's acceptances, 7th Wallace, p. 666.

The strength of the case is, that the Assistant Quarter Master had the authority, and his rank and assignment made it his duty, to supply the army or department with quarter master's stores. If an error in judgment as to needed quantity has been made, who shall suffer the party purchasing, or the party from whom the purchase was made?

The case cannot be different in the medical department, with the Assistant Surgeon General commissioned in performance of law with the rank of Colonel, and assigned to duty by the proper authority in a territorial department. His authority is complete, both to determine the amount of ice needed, and when and where it will be needed.

The court will, of course, note the distinction between the suspension of a contract and the annulment thereof. The latter makes void and inoperative altogether, whilst the former means a temporary intermission, or to cease proceeding for a while, and clearly implies the power to make it.

The effect of this suspension was very disastrous to Parish, whilst it recognized the power to issue the order it held up its execution for further instructions. Of course, under these circumstances, Parish was not at liberty to dispose of this ice in any way to other parties to partially indemnify himself for his great expenditures in purchasing the same, but was bound to hold on to it, to take care of it as best he could, to transfer it to rented ice-houses in order to preserve it for any future requisition by the Government. This subjected him to great additional expense, and yet 17,232 tons of this ice was never called for nor would it be received, and proved an entire loss to the contractor, which was a clear breach of the contract.

What the appellants claim is the contract price of 17,232 tons of ice, which they purchased at great expense under, as

we say, the orders of the Government, and were fully prepared to deliver; and this upon the well recognized principle, that when one party to an executory contract puts an end to it, or to a part of it, by refusing to fulfil, the other party is entitled to the same amount that he would have received if he had fully performed, deducting therefrom the amount saved to him by not being required to perform fully.

As the Court of claims has not reported nor found the amount saved to appellants, by not being required to perform the contract fully, it is unnecessary for us to trouble this court with the figures and calculations under the evidence which establishes the fact that after deducting all the expense that would have been incurred in the completion of the contract, and making a reasonable allowance to the United States for the freedom from risk, care, trouble and loss, that would have attended its fulfillment, there would have still been a large balance left for the appellants—at least enough to compensate them for the expense of the purchase of said ice and the just performance of said contract, which was done by them in good faith under the orders of the United States.

In the present condition of the record, this court, if it finds sufficient grounds for a reversal, will have to remand the cause for a proper judgment below.

In doing so, we ask the court also to indicate the rule of damages that should obtain under the facts of this case. This we ask because of the singular view which the dissenting judges took of this subject in this case, limiting our recovery to actual damages sustained by us on ten thousand tons of ice lost at Lake Pepin, instead of a recovery for the damages sustained by us on the whole breach. We call the attention of the court to the facts that we bought this great quantity

of ice that the Government did not receive, provided means to transport it, and then means to store and preserve it, and that all was lost; and for these reasons there seems to be no other rule applicable to this case. The rule adopted in Bulkley's case seems not to be applicable here. 19 Wallace, p. 37. The damages cannot be determined thereby, and can be ascertained only by the rule supported by the authorities cited in support of our second point.

We refer to the authorities cited under the point in the brief.

We submit the case with confidence that the court will reverse the judgment of the Court of Claims, for the errors assigned, and order judgment for the appellants.

JOHN B. SANBORN,
R. P. LOWE,
Attorneys for Appellants.

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JOHN B. SANBORN,
R. P. LOWE,
Attorneys for Appellants.

Supreme Court of the United States.

October Term, 1878.

JOSEPH W. PARISH & CO., FOR THE USE OF JOSEPH W. PARISH,
APPELLANTS,
vs.
THE UNITED STATES,
APPELLEE.

No. 720.

Appeal from the Court of Claims.

Argument for Appellants.

R. G. & E. C. INGERSOLL,
of Counsel.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS.
1879.

Supreme Court of the United States.

October Term, 1878.

JOSEPH W. PARISH & CO., FOR THE USE OF JOSEPH W. PARISH,
APPELLANTS,
vs.
THE UNITED STATES,
APPELLEE.
No. 720.

APPEAL FROM THE COURT OF CLAIMS.

Argument for Appellants.

R. G. & E. C. INGERSOLL, *of Counsel.*

STATEMENT OF THE CASE.

An act of Congress approved May 31, 1872, authorized "J. W. Parish and Company to commence suit against the United States in the Court of Claims for the recovery of such damages as shall appear to have been sustained by them by reason of the alleged violation by agents of the United States of the contract entered into on the 5th day of March, 1863, by and between Henry Johnson, medical storekeeper, United States army, and acting medical purveyor, and the said J. W. Parish and Company, for the de-

livery by said firm of the whole amount of ice required to be consumed at Nashville, St. Louis, Cairo, and Memphis during the remainder of that year."

It also vested the court with full power and authority "to hear and determine the validity of said claim"—the claim for damages—"and the amount, if any, of the damage of said J. W. Parish & Co., resulting solely from the violation of the contract, in the refusal of the Government *to receive the entire thirty thousand tons* named in said contract."

This act vested the Court of Claims only with power to consider the questions submitted. It had no power to pass upon the validity of the contract; for if invalid from lack of power on the part of the medical purveyor to make it, the act itself validated the contract. By the same rule of construction the act, in referring to the "thirty thousand tons named in said contract," recognized as valid the order of the Assistant Surgeon-General of March 25, 1863, which directed the delivery of thirty thousand tons of ice at Nashville, Cairo, Memphis, and St. Louis.

The questions of fact submitted by the act were:

1. The alleged violation of the contract by agents of the United States.
2. Whether damages were sustained by such violation.
3. The amount of the damages so sustained.

The contract with Medical Purveyor Johnson provided for the delivery of "the whole amount of ice required to be consumed at each respective point and vicinity, during the remainder of the year 1863."

The price to be paid on delivery at Nashville, was $25 per ton; at St. Louis, $16; at Memphis and Cairo, $20. Payment was to be made "on receipted bills of lading, and duplicate accounts certified to by the medical officer in charge of the post where it was delivered."

SUPREME COURT OF THE UNITED STATES.

No. 720.

JOSEPH W. PARISH AND WILLIAM L. HUSE, LATE PARTNERS UNDER THE NAME, FIRM, AMD STYLE OF JOSEPH W. PARISH & CO., FOR THE USE OF JOSEPH W. PARISH, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Original petition	1	1
Traverse	8	4
Special plea	9	5
Answer	11	5
Plea of limitation	13	6
Answer	14	7
Rejoinder	16	7
Motion and order	17	8
Amended petition	18	8
Judgment	26	12
Motion for appeal and order	27	12
Findings of fact	28	13
pinions	34	19
Defendants' request for additional findings	37	22
erk's certificate	39	22

1 In the United States Court of Claims, December term, 1872.

JOSEPH W. PARISH AND WILLIAM L. HUSE, late partners under the name, firm, and style of Joseph W. Parish & Co., for the use of Joseph W. Parish,
vs.
THE UNITED STATES.
No. 6492.

Petition.—Filed October 15, 1872.—*J. R.*

To the honorable the chief-justice and judges of the United States Court of Claims:

Your petitioners, Joseph W. Parish, a citizen of the United States and resident in Washington, in the District of Columbia, and William L. Huse, likewise a citizen of the United States and resident in the city of Peru, in the State of Illinois, respectfully represent:

1st. That on the 5th day of March, A. D. 1863, your petitioners were partners, doing a general business as contractors, under the name, firm, and style of Joseph W. Parish & Co., in the city of S't Louis and State of Missouri.

2d. That on the said fifth day of March, A. D. 1863, your petitioners entered into a certain contract with the United States for the objects and purposes stated therein, which said contract is in the words and figures following, to wit:

2 "Article of agreement made this fifth day of March, 1863, between Henry Johnson, medical-storekeeper, United States Army, and acting medical purveyor, Washington, D. C., on the one part, and Joseph W. Parish and William L. Huse, comprising the firm of Joseph W. Parish & Co., of the city of S't Louis, State of Missouri, of the other part, witnesseth:

"That the said Henry Johnson, medical store-keeper, United States Army, for and on behalf of the United States of America, and the said Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, in the manner following, viz:

"First. That said J. W. Parish & Co. shall deliver at Memphis, Tennessee, Nashville, Tennessee, S't Louis, Missouri, and Cairo, Illinois, the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863. Ice to be in quality A No. 1, and delivered at two thousand (2,000) pounds to the ton.

"Second. That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty-five dollars, ($25.)

"Third. That for each and every ton of ice delivered at S't Louis, Missouri, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of sixteen dollars, ($16.)

"Fourth. That for each and every ton of ice delivered at Cairo, Illinois, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars, ($20.)

"Fifth. That for each and every ton of ice delivered at Memphis, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars, ($20.)

"Sixth. All the ice delivered under this contract to be subjected to the inspection and approval of the medical officer in charge of

3 the post where it is delivered, and such as does not conform to the specifications set forth in this contract shall be rejected.

"Seventh. That payment shall be made from time to time on receipted bills of lading, and duplicate accounts certified to by the medical officer in charge of the post where it *it* delivered.

"Eighth. No member of Congress shall be admitted to any share herein, or any benefit to arise therefrom.

"Ninth. It is further agreed that the said J. W. Parish & Co. will allow three (3) working days for discharging each cargo at either one of the points before mentioned; after that time demurrage to be allowed by the said Henry Johnson, medical store-keeper, United States Army, as per charter-party or bill of lading of the vessel.

"In witness whereof the undersigned have hereunto placed their hands and seals the day and date above written.

[SEAL.] "HENRY JOHNSON,
"*Med. Store-keeper, U. S. A., Acting Med. Purveyor.*

[SEAL.] "J. W. PARISH & CO.

"Witnesses:
"R. A. PAYNE,
"FRANK L. SLADE."

3d. That on the 25th day of March, A. D. 1863, for the purpose of enabling your petitioners to enter upon the fulfilment and performance of the said contract, and to indicate the quantity of ice your petitioners would be "required" to furnish under the said contract, there was issued to your petitioners an order, in the words and figures following, to wit:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
"*S't Louis, Missouri, March* 25, 1863.

"Mess'rs J. W. PARISH & Co.:

"GENTLEMEN: I am instructed by the Assistant Surgeon-General to direct that the ice you have agreed to deliver as the points designated in your contract shall be distributed in the following quantities:

4 "At S't Louis, 5,000 tons; at Cairo, 5,000 ton'; at Memphis, 10,000 ton'; at Nashville, 10,000 tons, making the total 30,000 tons, which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay.

"Very respectfully, your obedient servant,
"JOSEPH B. BROWN,
"*Surgeon, United States Army.*

"By order of the Assistant Surgeon-General."

4th. That immediately upon the receipt by your petitioners of the said order your petitioners did at once proceed to comply therewith, and did thereupon purchase and procure the quantity of ice specified in the said order, and did under said order proceed to do and perform all the matters and things required by the said order and the said contract.

5th. That some time in the month of April or May, A. D. 1863, the Assistant Surgeon-General issued another order, in which your petitioners were notified that the order issued to your petitioners on the 25th day of March, A. D. 1863, was annulled and set aside, and that the quantity of ice which would be received by the United States from your petitioners under the said contract and the said first-mentioned order would be reduced by about twenty thousand tons, and your petitioners

aver that at the time they received the said last-mentioned order your petitioners had in all things completed their arrangements to enable them to comply in all things with the said first-mentioned order, as well as with the terms and requirements of the said contract; and that at the time your petitioners received the said last-mentioned order your petitioners were not only prepared to fulfill the said contract and to comply with the said first-mentioned order, but they were ready and willing so to do.

6th. And your petitioners further state that the United States
5 did not, nor would, receive from your petitioners, under the said contract and the said first-mentioned order, more than eleven thousand tons of ice, which said eleven thousand tons of ice were delivered by your petitioners under the said contract at the following-named places, viz:

At S't Louis, Missouri	3,639 tons.
At Cairo, Illinois	1,020 tons.
At Memphis, Tennessee	5,990 tons.
At Nashville, Tennessee	497 tons.

And your petitioners further aver that the balance and remainder of the ice purchased and procured by your petitioners for the purpose of enabling your petitioners to comply with the said contract and the said first-mentioned order, to the quantity of about nineteen thousand tons, was refused by the United States; and the United States at all times refused to receive and accept the said nineteen thousand tons of ice from your petitioners, although your petitioners were at all times ready and willing to deliver the same in com'liance with their said contract and of the said first-mentioned order, whereby the said nineteen thousand tons of ice became and was a total loss to your petitioners.

7th. That in consequence of the failure and refusal of the United States to receive from your petitioners the said nineteen thousand tons of ice, as above stated, your petitioners have sustained loss and have been damaged in the sum of two hundred and seventy-seven thousand and seven hundred and seventy-seven dollars and seventy cents, (277,777.70.)

8th. That at the second session of the Forty-second Congress of the United States an act was passed for the relief of your petitioners, in words and figures following, viz:

"An act conferring upon the Court of Claims power to hear and determine the claim of J. W. Parish and Company for damages for the alleged violation of their contract with the United States for the delivery of ice.

"Be it enacted by the Senate and House of Representatives of
6 the United States of America in Congress assembled, That authority is hereby given to J. W. Parish and Company to commence a suit against the United States in the Court of Claims for the recovery of such damages as shall appear to have been sustained by them by reason of the alleged violation by agents of the United States of the contract entered into on the fifth day of March, eighteen hundred and sixty-three, by and between Henry Johnson, medical store-keeper, United States Army, and acting medical purveyor, and the said J. W. Parish and Company, for the delivery by said firm of the whole amount of ice required to be consumed at Nashville, Saint Louis, Cairo, and Memphis during the remainder of that year; and said court is hereby invested

with full power and authority to hear and determine the validity of said claim, and the amount, if any, of the damage of said J. W. Parish and Company, resulting solely from the violation of the contract, in the refusal of the Government to receive the entire thirty thousand tons named in said contract.

"Approved May 31, 1872."

And your petitioners aver that they present their petition to this court under the provisions of the said special act of Congress, and not under the provisions of the general acts of Congress providing for the organization of this court.

9th. That this suit is prosecuted for the sole use and benefit of your petitioner, Joseph W. Parish, who has acquired the interest in the claim herein stated and set forth of your petitioner, William L. Huse.

10th. That neither of your petitioners ever gave any aid, comfort, countenance, or encouragement to rebellion against the Government of the United States, but that your petitioners, and each of them, have at all times borne true faith and allegiance to the said Government.

Your petitioners, therefore, by reason of the premises, pray judgment agains' the United States for the said sum of two hundred and seventy-seven thousand seven hundred and seventy-seven dollars and seventy cents, ($277,777.70.)

JOHN B. SANBORN,
Attorney for Claimant.

7 DISTRICT OF COLUMBIA,
County of Washington, ss:

Joseph W. Parish, being duly sworn, on his oath states that he is one of the claimants in the foregoing petition, and that no assignment or transfer of the claim stated and set forth in said petition has been made, except as stated therein; that the claimants, for the use of claimant J. W. Parish, are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in the said petition are true.

JOSEPH W. PARISH.

Subscribed and sworn to before me this fifteenth day of October, A. D. 1872.

[SEAL.] R. B. NIXON,
Notary Public.

8 In the Court of Claims of the United States, December term, A. D. 1872.

JOSEPH H. PARISH & CO.
vs.
THE UNITED STATES. } No. 6492.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimants herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimants in the sum of two hundred and seventy-seven thousand seven hundred and seventy-seven dollars and seventy cents, says that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claim-

ants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

WILLIAM McMICHAEL,
Assistant Attorney-General.

Filed December 17, 1872.

9 In the Court of Claims, December term, 1872.

J. W. PARISH AND COMPANY
vs.
THE UNITED STATES. } No. 6492.

And now comes the Attorney-General, on behalf of the United States, and says, that the claimants herein should not further have or maintain this suit against the defendants, for the reason that the said claimant heretofore filed his petition in this court, claiming to recover against the defendants for alleged breaches of the same identical contract for breaches of which a recovery is sought in this cause, which said contract was counted upon, annexed to, and formed part of said petition; and such proceedings were thereupon had in said court, that said cause was duly tried before said court at the December
10 term thereof, 1866, and judgment duly rendered on the merits thereof, on the 7th day of January, 1867, in favor of the claimants, and against said defendants, for $11,230.50; which said judgment is still in full force and effect, and unreversed, as by the record thereof in this court will more fully appear, reference being thereto had; and that the supposed breaches of covenant, and the alleged causes of action upon which a recovery is claimed in this cause, had each and all then already occurred and accrued at the time of the filing of the petition, and the commencement of the said former suit, in which judgment was so rendered as aforesaid; and this the said defendants are ready to verify.

Wherefore they pray judgment, &c.

JOHN GOFORTH,
Ass't Att'y-General.

Filed August 11, 1873.

11 Court of Claims of the United States, December term, 1872.

JOSEPH W. PARISH & CO.
vs.
THE UNITED STATES. } No. 6492.

Answer to special plea of defendants.

And now come the claimants in the above-entitled action, by their attorney, John B. Sanborn, and for answer to the special plea in bar of the defendant herein, deny that they, or either of them, heretofore filed their petition in this court, claiming to recover against the defendants for alleged breaches of the same identical contract for breaches of which a recovery is sought in this case, or that said contract was counted upon, annexed to, or formed part of said petition. The claimants admit hat they brought and maintained their action against the defendants or money advanced and paid out by them, on account of said defend-

ants, for demurrage of boats and vessels engaged in delivering ice under said contract, which the defendants, in and by a separate, special, and independent stipulation in said contract, and in the contract set forth in this action, had agreed to refund and pay, but they aver that the contract set forth and pleaded in that action was a different contract from that set forth and pleaded in this action, and that the subject-matter of said action and the issues joined therein had no connection with, and were entirely foreign to, the subject-matter of and the issues joined in this action, and aver that said contract pleaded herein contain several separate and distinct specifications and provisions inde-
12 pendent of each other, and each constituting a separate and distinct contract, and that this action is based upon one of those provisions and specifications, and that no action has ever before been brought or maintained thereon.

2. And the claimants, for further answer to said special plea in bar, aver that long after the determination of and judgment of this honorable court, in the action in said special plea in bar mentioned and described, the defendants herein did authorize and empower these claimants to have and maintain their action upon the grounds and for the causes set forth and pleaded in their said petition, for any damages sustained by them by the breaches in the said contract therein alleged, and did confer upon this honorable court jurisdiction to hear and determine the same, in and by the act of Congress set forth and pleaded in their said petition.

All of which the claimants are ready to verify, and as by the records and files of this honorable court will fully and at large appear. Wherefore they pray judgment as in their petition, &c.

JOHN B. SANBORN,
Claimant's Attorney.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Joseph W. Parish, being first duly sworn, deposes and says that he is one of the claimants in the above-entitled action, and that he has heard the foregoing answer read, and knows the contents thereof, and that the same is true of his own knowledge.

J. W. PARISH.

Subscribed and sworn to before me this 1st day of September, A. D. 1873.

[SEAL.] J. M. KENNEDY,
Notary Public.

Filed September 3, 1873.

13 In the Court of Claims of the United States, December term, 1873.

JOSEPH W. PARISH AND COMPANY
vs.
THE UNITED STATES. } No. 6492.

Plea.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants, for the reason that the petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.,

JOHN GOFORTH,
Assistant Attorney-General.

Filed Feb. 28, 1874.

14 In the Court of Claims, December term, 1873.

JOSEPH W. PARISH AND COMPANY
vs.
THE UNITED STATES. } No. 6492.

Now come the claimants and, for answer to the defendants' plea of the statute of limitations herein, allege that their petition herein was filed in this court within six months from the time that the Congress of the United States authorized and empowered said court to hear and determine the validity of said petitioners' claim as the same as is set forth and pleaded in their petition, and their amended petition herein; and that the defendants have promised and agreed to pay these claimants any and all sums due them on account of the violations by the defendants of the contract between the parties hereto set forth in their petition within six years of the time when their petition
15 herein was filed in this court, as by the said act of Congress set forth and pleaded in their said petition fully appears.

Wherefore they pray for judgment, as in their said petition, &c.

JOHN B. SANBORN,
Claimants' Att'y.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Joseph W. Parish, being first duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

JOSEPH W. PARISH.

Sworn to and subscribed before me this eleventh day of April, A. D. 1874.

[SEAL.] H. CLAY JOHNSON,
Notary Public.

Filed April 13, 1874.

16 In the Court of Claims, December term, 1873.

JOSEPH W. PARISH AND CO.
vs.
THE UNITED STATES. } No. 6492.

Rejoinder.

And now come the defendants, by their Attorney-General, and as to the replication of the said plaintiffs to the plea of the statute of limitations, whereon they pray for judgment, say that the said plaintiffs ought not, by reason of anything by them in that replication alleged, to have or maintain their aforesaid action thereof against the said defendants. Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Ass't Att'y-General.

Filed June 9, 1874.

17 In the Court of Claims, December term, 1873.

JOSEPH W. PARISH AND WILLIAM HUSE, LATE partners under the name, firm, and style of Joseph W. Parish and Co., for the use of Joseph W. Parish,
vs.
THE UNITED STATES.
} No. 6492.

And now come the claimants, by their attorney, and move this honorable court for an order granting them leave to amend their petition herein in accordance with the amended petition hereto attached, and to file said amended petition in lieu of the original petition.

JOHN B. SANBORN,
Claimants' Att'y.

Filed April 13th, 1874.

Allowed.
By the court.
APRIL 13, 1874.

18 In the U. S. Court of Claims, December term, 1872.

JOSEPH W. PARISH AND WILLIAM L. HUSE, late partners under the name, firm, and style of Joseph W. Parish & Co., for the use of Joseph W. Parish,
vs.
THE UNITED STATES.
} No. 6492.

Amended petition.—Filed April 13, 1874.

To the honorable, the Chief-Justice and judges of the United States Court of Claims:

Your petitioners, Joseph W. Parish, a citizen of the United States, and resident in Washington in the District of Columbia, and William L. Huse, likewise a citizen of the United States and resident in the city of Peru, in the State of Illinois, respectfully represent:

1st. That on the 5th day of March, A. D. 1863, your petitioners were partners, doing a general business as contractors under the name, firm, and style of Joseph W. Parish & Co., in the city of S't Louis, nd State of Missouri.

19 2d. That on the said fifth day of March, A. D. 1863, your petitioners entered into a certain contract with the United States, for the objects and purposes stated therein, which said contract is in the words and figures following, to wit:

"Article of agreement made this fifth day of March, 1863, between Henry Johnson, medical store-keeper, United States Army, and acting medical purveyor, Washington, D. C., on the one part, and Joseph W. Parish and William L. Huse, comprising the firm of Joseph W. Parish & Co., of the city of S't Louis, State of Missouri, of the other part, witnesseth:

"That the said Henry Johnson, medical store-keeper, United States Army, for and on behalf of the United States of America, and the said Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., for themselves, their heirs, executors, and administrators,

have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, in the manner following, viz:

"First. That said J. W. Parish & Co. shall deliver at Memphis, Tennessee; Nashville, Tennessee; S't Louis, Missouri; and Cairo, Illinois, the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863. Ice to be in quality A No. 1, and delivered at two thousand (2,000) pounds to the ton.

"Second. That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty-five dollars,($25.)

"Third. That for each and every ton of ice delivered at S't Louis, Missouri, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of sixteen dollars, ($16.)

"Fourth. That for each and every ton of ice delivered at Cairo, Illinois, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars, ($20.)

20 "Fifth. That for each and every ton of ice delivered at Memphis, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars, ($20.)

"Sixth. All the ice delivered under this contract to be subjected to the inspection and approval of the medical officer in charge of the post where it is delivered, and such as does not conform to the specifications set forth in this contract shall be rejected.

"Seventh. That payment shall be made from time to time on receipted bills of lading and duplicate accounts certified to by the medical officer in charge of the post where it is delivered.

"Eighth. No member of Congress shall be admitted to any share herein or any benefit to arise therefrom.

"Ninth. It is further agreed that the said J. W. Parish & Co. will allow three (3) working days for discharging each cargo at either one of the points before mentioned; after that time demurrage to be allowed by the said Henry Johnson, medical store-keeper, United States Army, as per charter-party or bill of lading of the vessel.

"In witness whereof the undersigned have hereunto placed their hands and seals the day and date above written.

[SEAL.] "HENRY JOHNSON,
"*Med. Store-keeper, U. S. A., Acting Med. Purveyor.*
[SEAL.] "J. W. PARISH & CO.
"Witnesses:
"R. A. PAYNE.
"FRANK L. SLADE."

3d. That on the 25th day of March, A. D. 1863, for the purpose of enabling your petitioners to enter upon the fulfilment and performance of the said contract, and to indicate the quantity of ice your petitioners would be "required" to furnish under the said contract, there was issued to your petitioners an order in the words and figures following, to wit:

21 "ASSISTANT SURGEON-GENERAL'S OFFICE,
"*S't Louis, Missouri, March* 25, 1863.

"Mess'rs J. W. PARISH & Co.:

"GENTLEMEN: I am instructed by the Assistant Surgeon-General to direct that the ice you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities:

"At S't Louis, 5,000 tons; at Cairo, 5,000 tons; at Memphis, 10,000 tons; at Nashville, 10,000 tons; making the total of 30,000 tons which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay.

"Very respectfully, your obedient servant,

"JOSEPH B. BROWN,

"*Surgeon, United States Army.*

"By order of the Assistant Surgeon-General."

4th. That immediately upon the receipt by your petitioners of the said order, your petitioners did at once proceed to comply therewith, and did thereupon purchase and procure the quantity of ice specified in the said order, and did under said order proceed to do and perform all the matters and things required by the said order and the said contract.

5th. That on the 31st day of March, A. D. 1863, the said Assistant Surgeon-General, United States Army, R. C. Wood, in charge of the medical department of the West, issued another order, in the words and figures following, viz:

"ASSISTANT SURGEON-GENERAL'S OFFICE,

"*S't Louis, Mo., March* 31, 1863.

"To J. W. PARISH & Co.,

"(Care of C. H. Wicker & Co.,)

"*Chicago, Ill.:*

"I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

"R. C. WOOD.

"*Assistant Surgeon-General.*"

22 And the claimants aver that they, nor either of them, did ever receive the order last above mentioned, and had no knowledge that such an order had been issued till the claimant, Joseph W. Parish, was advised of the same, verbally, at the office of the said Asssistant Surgeon-General, some time in April, the precise date of which he cannot give, but avers that it was not earlier than the 5th day of April, A. D. 1863, and not until after all the ice had been purchased and all the arrangements made and expense incurred, except that of transportation, to enable him to supply said thirty thousand tons of ice at the places and times specified in said first-mentioned order, as by the terms of the said order and said contract they were required to do, and avers that they were prepared and willing to do.

And the petitioners further aver that, at the time they were so verbally advised of the issuance of said last-mentioned order, they were also advised by the person giving said information at the Assistant Surgeon-General's Office, that the order would in the end make no difference in the quantity of ice ordered, as the entire quantity named in the first order would be needed by the Army, as therein specified.

6th. And your petitioners further allege, that they did not receive any further or other instructions than those above stated in this petition at any time, and that the United States did not and would not receive from your petitioners under said contract and first-mentioned order more than twelve thousand seven hundred and seventy and twenty-two-twenty-fourths tons, which said twelve thousand seven hundred and seventy and

twenty-two-twenty-fourths tons were delivered by your petitioners, under the said contract, at the following-named places, viz:

At S't Louis, Missouri	4,174 $\frac{20}{24}$ tons.
At Cairo, Illinois	1,388 $\frac{7}{24}$ tons.
At Memphis, Tennessee	6,456 $\frac{19}{24}$ tons.
At Nashville, Tennessee	750 tons.

23 And your petitioners further aver, that the balance and remainder of the ice so purchased and procured by your petitioners, for the purpose of enabling your petitioners to comply with the said contract and the said first-mentioned order, to wit, seventeen thousand two hundred and thirty and one-twelfth tons, was refused by the United States, and the United States at all times refused to receive or accept the said seventeen thousand two hundred and thirty and one-twelfth tons of ice, or any part or portion thereof, from your petitioners, although your petitioners were at all times ready and willing to deliver the same, in compliance with their said contract and of the said first-mentioned order, whereby the said seventeen thousand two hundred and thirty and one-twelfth tons of ice became and was a total loss to your petitioners.

7th. That in consequence of the failure and refusal of the United States to receive from your petitioners the said seventeen thousand two hundred and thirty and one-twelfth tons of ice, as above stated, your petitioners have sustained loss, and have been damaged in the sum of two hundred and fifty-one thousand eight hundred and eighty-seven dollars and seventy-two cents.

8th. That at the second session of the Forty-second Congress of the United States an act was passed for the relief of your petitioners, in words and figures following, viz:

"An act conferring upon the Court of Claims power to hear and determine the claim of J. W. Parish and Company for damages for the alleged violation of their contract with the United States for the delivery of ice.

"Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That authority is hereby given to J. W. Parish and Company to commence a suit against the United States in the Court of Claims for the recovery of such
24 damages as shall appear to have been sustained by them by reason of the alleged violation by agents of the United States of the contract entered into on the fifth day of March, eighteen hundred and sixty-three, by and between Henry Johnson, medical store-keeper, United States Army, and acting medical purveyor, and the said J. W. Parish and Company for the delivery by said firm of the whole amount of ice required to be consumed at Nashville, Saint Louis, Cairo, and Memphis during the remainder of that year; and said court is hereby invested with full power and authority to hear and determine the validity of said claim, and the amount, if any, of the damage of said J. W. Parish and Company resulting solely from the violation of the contract, in the refusal of the Government to receive the entire thirty thousand tons named in the said contract.

"Approved May 31, 1872."

And your petitioners aver that they present their petition to this court under the provisions of the said special act of Congress, and not under the provisions of the general acts of Congress providing for the organization of this court.

9th. That this suit is prosecuted for the sole use and benefit of your petitioner, Joseph W. Parish, who has acquired the interest in the claim herein stated and set forth of your petitioner, William L. Huse.

10th. That neither of your petitioners ever gave any aid, comfort, countenance, or encouragement to rebellion against the Government of the United States, but that your petitioners, and each of them, have at all times borne true faith and allegiance to the said Government.

Your petitioners therefore, by reason of the premises, pray judgment against the United States for the said sum of two hundred and fifty-one thousand eight hundred and eighty-seven dollars and seventy-two cents.

JOHN B. SANBORN,
Attorney for Claimant.

25 DISTRICT OF COLUMBIA,
County of Washington, ss:

Joseph W. Parish, being duly sworn, on his oath states that he is one of the claimants in the foregoing petition, and that no assignment or transfer of the claim stated and set forth in the said petition has been made, except as stated therein; that the claimants, for the use of claimant J. W. Parish, are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

JOSEPH W. PARISH.

Subscribed and sworn to before me this eleventh day of April, A. D. 1874.

[SEAL.] CHA'S CONS. CALLAN,
Notary Public.

26 In the Court of Claims, December term, 1876.

JOSEPH W. PARISH AND WILLIAM L. HUSE, late partners under the name, firm, and style of Joseph W. Parish and Company, for the use of Joseph W. Parish,
vs.
THE UNITED STATES. } No. 6492.

At a Court of Claims held at the Capitol, in the city of Washington, on the 18th day of June, A. D. 1877, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimants' petition be dismissed.

By the court.

A true copy.

27 In the Court of Claims, December term, 1876.

JOSEPH W. PARISH AND WILLIAM L. HULSE, late partners under the name, firm, & style of Joseph W. Parish & Co., for the use of Joseph W. Parish,
vs.
THE UNITED STATES. } No. 6492.

From the judgment rendered in the above-entitled cause on June 18th, 1877, in favor of the United States, the petitioners, by their attorneys

on the 2nd day of July, 1877, make application for, and give notice of an appeal to the Supreme Court of the United States.

(S'd) SANBORN & KING,
Att'ys for the Petitioners.

Filed July 5, 1877.

Allowed.

(S'd) C. D. DRAKE, *C. J.*

28 Court of Claims.

JOSEPH W. PARISH ET AL.
vs.
THE UNITED STATES. } No. 6492.

Findings of fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the twenty-second day of January, 1863, at Washington, D. C., Henry Johnson, medical store-keeper, United States Army, representing the Surgeon-General's Department, issued the following advertisement:

"PROPOSALS FOR ICE.

"MEDICAL PURVEYOR'S OFFICE,
"*Washington, D. C., January* 22, 1863.

"Sealed proposals will be received at this office until Monday, the 23d day of February, 1863, at 12 o'clock m., for furnishing the medical and hospital department until the 1st day of January, 1864, with a supply of pure ice, to be delivered at the following places, to wit, Hilton Head, S. C.; New Berne, N. C.; Fortress Monroe, V'a; Pensacola, Fl'a; Nashville, Tenn.; New Orleans, L'a; Saint Louis, Mo.; Cairo, Ill.; Washington, D. C.; Memphis, Tenn.

"As the quantity required at the respective posts is not precisely known, bidders will state the quantity of ice they can furnish; where it is gathered; price per ton of two thousand pounds, and within what period they can furnish the amount of their bids, although it is advisable that bidders should propose to furnish the whole amount required at any one of the places proposed to be supplied.

"Bidders will state what facilities they possess, if any, for storing the ice at the posts they propose to supply.

"The ice must be of the best quality, subject to the inspection and approval of the officer in charge of the post where it is delivered.

"The full name and post-office address of the bidder must appear in the proposal.

"If a bid is made in the name of the firm, the names of all the parties must appear, or the bid will be considered as the individual proposal of the party signing it.

"Proposals from disloyal parties will not be considered, and an oath of allegiance to the United States Government must accompany each proposition.

"Proposals must be addressed to Henry Johnson, M. S. K., U. S. A., and acting medical purveyor, Washington, D. C., and should be plainly marked 'Proposals for ice.'

"The ability of the bidder to fill the contract, should it be awarded him, must be guaranteed by two responsible persons, whose signatures'

are to be appended to the guarantee, and said guarantee must accompany the bid.

"The responsibility of the guarantors must be shown by the official certificate of the clerk of the nearest district court or of the United States district attorney.

29 "Bidders must be present in person when the bids are opened, or their proposals will not be considered.

"Bonds in the sum of five thousand dollars, signed by the contractor and both of his guarantors, will be required of the successful bidder upon signing the contract."

II. The claimant, Joseph W. Parish, using the firm name of J. W. Parish & Co., made proposals, as invited by said advertisement, to supply ice at Memphis, Nashville, Saint Louis, and Cairo; and the contract set out in the petition was entered into by said Parish, in the said firm name; but neither at the time of making said proposals, nor at the time of the signing of said contract, nor at any time after either of those events, was there any partnership between the said Parish and the said William L. Huse; nor did the said Huse at any time before or after either of said events authorize the said Parish to use his name jointly with the name of said Parish, or otherwise, in connection with said proposals or said contract; nor did the said Huse have any knowledge of his name having been so used by said Parish until after the said contract was signed; and when, after the said contract was signed, the said Parish informed said Huse that he had so used said Huse's name, the said Huse refused to engage with said Parish in said contract, and in fact never has had any interest, or taken any part, therein; but the said Huse did not notify any officer of the Government that his name had been so used without his authority, because he did not consider himself bound thereby, and therefore did not think it necessary to give such notice.

III. R. C. Wood was assistant surgeon-general, acting in that official capacity at Saint Louis before and after the 25th day of March, 1863.

Henry Johnson, on the 5th of March, 1863, was medical store-keeper, U. S. A., and, at the time stated, on duty as acting medical purveyor at Washington, D. C.

Joseph B. Brown was, on the 25th day of March, 1863, and during the months of April and May, 1863, a surgeon, United States Army, with the rank of major, and on duty in the office of the assistant surgeon-general, United States Army, at Saint Louis, Mo.

IV. The following instructions were given by the Surgeon-General of the United States to said Assistant Surgeon-General R. C. Wood:

Copy of general instructions issued to Assistant Surgeon-General R. C. Wood.

"SURGEON GENERAL'S OFFICE,
"*July* 28, 1862.

"SIR: In compliance with orders from the War Department, assigning you to duty in Saint Louis, you are relieved from further duty in this office.

"Surgeon J. B. Brown and Assistant Surgeon B. E. Fryer have been ordered to report to you for duty in your office, or such other service as you may see fit to assign them to.

"Medical Inspectors Cuyler, Keeney, Lyman, and Allen have also been ordered to report to you in Saint Louis. These officers you will assign

to special districts, and require them to visit, as far as possible, each hospital or camp within their limits at least once in each month.

"The boundaries of the districts, and the location of each medical inspector, are left to your judgment. I desire, however, that you will station Medical Inspector Keeney at Chicago, and assign to him, as his district, the Northwestern and such of the Western States as in your opinion may be proper.

"In addition, the vessels engaged in the transportation of the sick and wounded should be special subjects of inspection.

"The reports of the medical inspectors under your orders must be made in duplicate, one for your office and one for the office of the Medical Inspector-General, in this city. These latter will be addressed to that officer, under cover to the Surgeon-General.

"Unless absolutely necessary, it is not desirable to increase the number of general hospitals, especially at this season of the year, in extreme northern localities.

"The President is desirous that the sick should be cared for, as far as possible, within the limits of the commands to which they belong.

"Authority is given you to make contracts with private physicians in such number as you may deem necessary.

"After your examination and approval of the applicants, one copy of the contract must be forwarded to this office for approval. Unless in cases of absolute necessity, you will not permit this power to be exercised by any other medical officer under your command.

"Contracts made by others must be approved by you before they will be approved in this office.

"You are also authorized to give permission to medical officers to employ civilians as nurses, according to the form of contract now in use. These nurses will receive $20.50 per month pay, and $3 per month for commutation of clothing, and one ration each.

"They will be required to uniform themselves, in accordance with the provisions of Circular No. 4.

"You are authorized to approve requisitions of medical purveyors on the purchasing purveyors, a duplicate of the requisition being sent to this office in order that it may be furnished by a purveyor, to be designated by the Surgeon-General. In case of necessity, you may yourself order the immediate purchase of such medicines and other supplies as may be required, informing me as soon as possible of your action.

"It is expected that you will make as frequent visits as the duties of your office will permit to the various general hospitals and camps within the limits of your jurisdiction.

"Of course, it is impossible for me, even if it were desirable, to ask your attention to subjects which of course will, in the ordinary routine of business, come under your notice.

"Your large experience and devotion to the Army and the corps are ample guarantees that the important duty assigned to you will be faithfully and efficiently performed.

"The States of Indiana, Illinois, Kentucky, Tennessee, Missouri, Kansas, Iowa, Wisconsin, Minnesota, and Michigan, with such parts of Alabama, Mississippi, and Arkansas as are occupied by the troops lately under Major-General Hallock's immediate command, are those over which your jurisdiction will extend.

"Very respectfully, your obedient servant,

(Signed) "W. A. HAMMOND,

"*Surgeon-General, United States Army.*"

3 V. On the 25th day of March, 1863, Joseph B. Brown, by in struction of Assistant Surgeon-General Wood, issued the following order:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
"*S't Louis, Missouri, March* 25, 1863.

"Messrs. J. W. PARISH & Co.:

"GENTLEMEN: I am instructed by the assistant surgeon-general to direct that the ice which you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities, viz:

"At S't Louis..... 5,000 tons,
"At Cairo..... 5,000 tons,
"At Memphis..... 10,000 tons,
"At Nashville..... 10,000 tons,

making the total of 30,000 which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay.

"Very respectfully, your ob't servant,

"By order of the assistant surgeon-general:

(Sig.) "JOSEPH B. BROWN,
"*Surgeon, United States Army.*"

A copy of this order being received at the Surgeon-General's Office, the following telegram and letter were sent to Assistant Surgeon-General Wood.

"SURGEON-GENERAL'S OFFICE,
"*March* 31, 1863.

"Parish & Co. have not contracted for 30,000 tons of ice. Suspend the order you gave him.

(Sig.) "W. A. HAMMOND,
Surgeon-General.

"Col. R. C. WOOD,
"*Ass't Surgeon-General, U. S. Army, S't Louis.*"

"SURGEON-GENERAL'S OFFICE,
"*Washington, D. C., March* 31, 1863.

"SIR: Your communication of the 25th instant to J. W. Parish & Co. in regard to the quantities of ice to be delivered at the different points for which they contract, forwarded to this office for the information of the Surgeon-General, has been received.

"I am instructed to inform you that the contract with Parish & Co. was made for such quantities as might be needed; and that the ice should be ordered from them, from time to time, to different points, in lots of a few hundred tons, as needed.

"Very respectfully, your obedient servant,

"C. H. ALDEN,
"*Assistant Surgeon, U. S. A.*

"Col. R. C. WOOD,
"*Assistant Surgeon-General, S't Louis, Mo.*

32 In this connection the following telegram was sent, but not addressed to the claimant at his residence or place of business:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
"*S't Louis, Missouri, March* 31, 1863.

"To J. W. PARISH & Co., (Care C. H. Wicker & Co.,)
"*Chicago, Ill.:*

"I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

(Sig.) "R. C. WOOD,
"*Ass't Surgeon-General.*"

It does not appear that this dispatch ever reached the claimants, or either of them. The claimant Parish did have knowledge of this notice by oral information from the assistant surgeon-general at Saint Louis, on the 2d day of April following.

VI. Prior to the delivery to the said Parish of Joseph B. Brown's letter of March 25, 1863, set forth in finding V, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and after the delivery of said letter to him, he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2d day of April, 1863, apprised of the aforesaid order of Surgeon-General Hammod, of March 31, he had purchased or contracted for the purchase of 23,000 tons of ice.

VII. The whole amount of ice which was received by the officers of the Government under said contract, omitting fractions, was as follows:

	Tons.
At Saint Louis	4,174
At Cairo	1,388
At Memphis	6,456
At Nashville	750
Total	12,768

For this quantity the said Parish has been paid the contract prices.

VIII. Of the 23,000 tons of ice purchased by said Parish between the 25th of March and the 2d of April, 1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi River was such that with a sufficiency of steamboats and barges present there in the early part of that month, that quantity might have been transported southward to Saint Louis and the other places at which the said Parish was required by said contract to furnish said ice; but the said Parish did not have steamboats and barges at said lake in that month to transport the ice which he had purchased there; and after that month the water in said river became and continued so low that the said ice could not be so transported southward, and the same melted and was lost to the said Parish.

IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid.

33 X. The following letters were written and sent from the assistant surgeon-general's office at Saint Louis:

"ASS'T SURGEON-GENERAL'S OFFICE,
"*S't Louis, Mo., April 3rd*, 1863.

"GENTLEMEN: I am instructed by the ass't surgeon-general to forward to you the enclosed copy of letter from the Surgeon-General for your information:

"The ass't surgeon-general advises that you establish depots of ice, which should be kept at all times amply supplied to fill all necessary requisitions that may be from time to time made upon them, at the following points: S't Louis, Cairo, Memphis, Nashville.

"You will notify Med. Director G. Perin, U. S. A., Dep't Cumberland, Nashville; Med. Director M. Mills, Dep't of the Tenn., headquarters Gen'l Grant; Med. Director L. H. Holden, U. S. A., Dep't of the Ohio, Cincinnati; Med. Director D. L. Magruder, U. S. A., Dep't of the Missouri, S't Louis, when your depots are ready to issue the ice required, and the name of your agent in charge of the depot, who will also be instructed by you to issue in conformity with the requisitions, made from time to time upon them.

"Very respectfully, your obedient servant,
"By order of the ass't surgeon-general.
(Signed) "JOSEPH B. BROWN,
"*Surgeon, U. S. A.*

"Messrs. J. W. PARISH & CO.,
"*S't Louis, Mo.*"

"ASS'T SURGEON-GENERAL'S OFFICE,
"*S't Louis, Mo., April 8th*, 1863.

"SIR: I have the honor to acknowledge the receipt of your letter of the 4th inst., enclosing reply of Surgeon Mills, medical director, Dep't of the Tenn., in reference to the supply of ice.

"Enclosed *at* the instructions given on the 3rd inst. to Messrs. Parish & Co., and to the medical directors of the department indicated.

"I will endeavor to arrange the details for the delivery from time to time as required, in such a manner as will best ensure a regular and liberal supply to those needing it.

"Very respectfully, your obedient servant,
(Signed) "R. C. WOOD,
"*Ass't Surgeon-General.*

"Brig. Gen. W. A. HAMMOND,
"*U. S. A., Surgeon-General, Washington, D. C.*"

XI. The notice of 25th March, 1863, to the claimants from the assistant surgeon-general's office, at Saint Louis, set out in finding V, and which was suspended by order of the Surgeon-General, remained so suspended until the expiration of the time named in it for the duration of the contract of the 5th of March, 1863.

XII. The profits which the claimant would have made upon 30,000 tons of ice, less 12,768 tons—to wit, 17,232 tons, if the same had been accepted by the defendants' officers in the manner prescribed by the order of 25th March, 1863—were $ per ton, amounting to $. The loss sustained by the claimant upon the 10,000 tons of ice purchased and lost at Lake Pepin was $ per ton.

34 Court of Claims.

JOSEPH W. PARISH ET AL.
vs.
UNITED STATES. } No. 6492.

DRAKE, Ch. J., delivered the opinion of the court:

The claimants do not contend that the contract of March 5, 1863, set forth in the petition, was a contract for the delivery of thirty thousand tons, or any other specific quantity, of ice; but that the letter of Assistant Surgeon-General Wood had, in law, the effect of fixing that as the quantity to be delivered at the places therein designated; in other words, that that letter became a part of the contract, and bound the Government to receive that quantity of ice, just as if its terms had been inserted in the written agreement. We do not assent to this proposition.

The advertisement inviting proposals for furnishing ice issued from the medical purveyor's office in Washington, and whatever contract should be entered into would be. and in fact was, not with Assistant Surgeon-General Wood, at Saint Louis, but with Henry Johnson, medical store-keeper and acting medical purveyor, at Washington, representing the Medical and Hospital Department of the Army. That advertisement notified bidders that the quantity of ice required at the respective posts was not precisely known, and the contract with the claimants called for no named quantity at any of the posts which they were to supply, but bound them to deliver the "whole amount of ice required to be consumed at each respective point and vicinity during the remainder ot the year 1863."

Upon whose requirement was the ice to be delivered? Clearly upon that of the officer who made the contract, or some other officer authorized by the head of the Medical and Hospital Department of the Army to act in the premises. No subordinate had any right to interpret the contract and decide that it called for 30,000 tons, and direct how it should be distributed. This was what Assistant Surgeon-General Wood undertook to do. That he had no authority from the Department in Washington for his action is manifest from the terms of the instructions under which he was performing duty at Saint Louis, and which are set forth above; but more especially from the instant disapproval of his action by the Surgeon-General at Washington, as soon as it became known to him. The fact is, Wood attempted to do what he had not the least authority to do; that is, to make definite and fixed what his superior officers had purposely left indefinite, because, in the nature of the case, they could not fix it; and to interpret, by his judgment, what was, by the terms of the contract, clearly intended to be interpreted by the judgment of his superiors, based on the accruing demands of the service. Beyond question this was making a change in the terms of the contract, and was wholly nugatory; and the claimants were bound to know that he had authority to make such change before they attempted to act in pursuance of it.

In our judgment, the letter of Assistant Surgeon-General Wood was no part of the contract, and imposed no liability on the Government; and, as the claimants' case rests upon that, their petition must be dismissed.

Judge Loring, though not present when this opinion was delivered, concurred therein.

35 NOTT, J., dissenting:

The facts upon which this case turns are: first, that the contract

here was made by the Surgeon-General, (for the medical purveyor who signed it was merely one of the Surgeon-General's staff in Washington;) and, second, that the Assistant Surgeon-General's order to furnish *ice said* to the contractor, "The ice to be delivered at Nashville and Memphis (20,000 tons) is for the use of the sick of the armies in the field, and should be furnished without delay."

The supplies for the Army are and always have been purchased, so far as practicable, by the Quartermaster-General, the Commissary-General, and the Surgeon-General. Having thus been obtained by the head of the military bureau at the seat of Government, they are then taken in charge and distributed by the chief quartermaster, commissary, or surgeon in the military department or district for which they have been provided; and he represents, and to all intents and purposes is, the Quartermaster-General, Commissary-General, or Surgeon-General in that department or district. To avoid the risk and inconvenience of actual store-houses or depots of supplies, the contract system has been resorted to, by which contractors furnish, as called upon, the supplies of a department or district. These contracts are, in effect, handed over to the chief quartermaster, commissary, or surgeon, and he issues requisitions and takes charge of their performance precisely as though he had made them himself, or as though they were a depot of supplies committed to his official care.

That the Assistant Surgeon-General of the Army in 1863, while in charge, as chief medical officer, of an immense military district, embracing about half the theater of actual warfare, had not the same authority which has been exercised in every branch of the Army in like cases time out of mind; that he had not power to call upon the contractors for his department to furnish the supplies provided for it; that he was the one exception to the universal rule of Army administration, or that it was necessary for the Surgeon-General himself to go down to the department and distribute the supplies which he had provided by contract for it, are propositions which will be regarded by every person conversant with Army matters as purely theoretical or speculative, framed in entire disregard of long-established and well-settled official rules and administrative usages.

But whether the Assistant Surgeon-General had or had not authority to order the ice contractor for his department to furnish the ice required for his hospitals need not be discussed in this case, inasmuch as the order which forms the basis of the suit, and the cause of the claimants' damage, was that of the Surgeon-General himself. In the Army, when a superior officer amends, modifies, or changes the order of his inferior, it immediately becomes his order. If the Assistant Surgeon General had no authority to order the claimant to deliver this ice "without delay," as he did, the Surgeon-General, if he did anything, should have revoked the order and notified the contractor. He could not adopt it so far as to keep it in suspense, and at the same time declare that it never had vitality. To suspend it was to give it vitality if it had none, and to that extent to ratify it. The same principle prevails in the common law, for there is no such thing as ratifying and not ratifying; as adopting and not adopting; as keeping the act of the agent in existence, and declaring that it never had existence. Somebody had power under this contract to order this contractor to furnish this ice and to designate the places where it was to be delivered; and when the Surgeon-General interfered with the action of the local administrative officer in charge,
36 he was bound to do one thing or the other—to revoke the order for want of authority, or to modify it and assume the consequences.

The question, therefore, is whether this order has caused damage to the claimant, and the nature and extent thereof.

The terms of the contract were that the claimant should deliver at designated places "the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863," and that the defendants should pay a designated price "for each and every ton of ice delivered, and accepted by the medical officer in charge." Upon these obligations the claimant contends that the order to deliver 30,000 tons of ice bound the defendants to accept that quantity as effectually as if it had been written in the contract. It is also insisted that the perishable nature of the commodity, and the fact that the order to deliver was not revoked, but kept in suspense, are distinctions which take the case out of the rule laid down by this court in Bulkley's Case, (7 C. Cl's R., 543,) which was affirmed by the Supreme Court, (9 id., p. 81.)

That rule is that where parties contract for such unknown amount as the uncertainty of military affairs may require during a designated period, the contractor thereby agrees to share in that uncertainty, and cannot recover profits unless his services or his merchandise were actually required; but where the defendants throw upon the contractor needless expense by notifying him to perform and then revoking the order, he should recover the damage which he has actually suffered. The fact that this contractor's commodity was of the most perishable nature was a fact known to him when he agreed to deliver the amount of ice "required to be consumed;" and the fact that the order for 39,000 tons was suspended and not revoked, goes only to the extent of the loss, and not to the nature of the breach. There is no distinction that I can perceive between the nature of the damage in this and in the former case.

The question then arises, to what extent should the claimant recover? He should not recover the profits which he might have made on the 17,232 tons of ice ordered, but not accepted, because it was not "required to be consumed." He should not recover his actual losses upon any ice purchased before the defendants' order for 30,000 tons was given, for such purchases were made upon his own responsibility and at his own risk. He should not recover for any ice purchased upon the faith of the order and subsequently delivered to the defendants, for as to such this order caused him no damage. Applying these restrictions to the facts of the case will reduce his recovery to the losses which he actually suffered on the 10,000 tons of ice purchased at Lake Pepin. That this ice proved a total loss to the contractor, and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial. A large quantity of ice is not a commodity that can be handled and thrown upon the market in warm weather, nor sent forward and stored to await a demand. If the order to deliver 20,000 tons at Memphis and Nashville "without delay" had not been suspended on the 2d April, the claimant could have thus disposed of this parcel at Lake Pepin. The order to deliver caused him to purchase it; the suspension of the order occasioned its loss; and for his actual damages thus suffered the defendants are liable.

Peck, J., was not present when the decision was announced, but took part in the consideration of the case and agreed in the opinion read by Nott, J.

37 PARISH & Co. } 6492.
v.
THE UNITED SSATES. }

The Assistant Attorney-General, on behalf of the United Sta tes, re quests the court to find the following additional facts:

1st. On the 24th and 25th March, 1863, Parish called upon R. C. Wood, Assistant Surgeon-General, and stated to him that he had made a contract for 30,000 tons of ice with Medical Store-keeper Johnson, to be delivered at Saint Louis, Cairo, Memphis, and Nashville in such quantities as he, Wood, might direct.

2. In the same interviews he stated to Wood that his arrangement was to provide for at least that amount at the places indicated with as little delay as practicable.

3. Parish repeatedly stated in the presence of the officers of the office that the Surgeon-General was anxious to have the ice provided without delay, and that the arrangement corresponded with the wishes
38 of the Surgeon-General.

4. Thereupon the order of 25th March, 1863, set forth in Finding V, was issued.

5. It does not appear that Parish at the time he received from the Assistant Surgeon-General notice of the suspension of the order of 25th March, 1863, protested against the same.

6. It does not appear that plaintiff made any effort to sell the undelivered 7,232 tons of ice which had been purchased by him elsewhere than at Lake Pepin, and the market-rates for ice at S't Louis and Chicago after the 2nd April, 1863, are not shown to have been less than the prices named in the contract.

(S'd) THOMAS SIMONS,
Ass't Attorney-General.

Upon these requests the court made the following rulings:
To the first, refused.
To the second, refused.
To the third, refused.
To the fourth, refused.
To the fifth, allowed.
To the sixth, allowed.

39 In the Court of Claims.

PARISH & COMPANY, FOR THE USE, &C., } No. 6492.
vs.
THE UNITED STATES. }

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the claimants' attorneys for the allowance of an appeal, as filed in the clerk's office July 5, 1877, and of the order of the chief-justice allowing the same, of the original petition & the traverse thereto, of the special plea of the defendants and the answer thereto, of the plea of limitation and the answer thereto & of the rejoinder to said answer, of the order granting leave to file an amended petition and of such amended petition, of the judgment of the court, of the application for an appeal and the allowance of the same, of the findings of fact and opinion of the court and

dissenting opinion, and of the defendant's request for additional findings of fact, with the rulings of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 1st day of August.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 720. Joseph W. Parish & William L. Huse, late partners under the name, firm, and style of Joseph W. Parish & Co., for the use of Joseph W. Parish, appellants, vs. The United States. Court of Claims. Filed 2nd August, 1877.

Supreme Court of United States.

OCTOBER TERM, 1877.

JOSEPH W. PARISH & Co., *for the use of* JOSEPH W. PARISH, *Appellant*,
vs.
THE UNITED STATES, *Appellee*.
No. 720.

Appeal from the Court of Claims.

Argument for Appellant

By JOHN B. SANBORN,
R. P. LOWE.

R. O. Polkinhorn, pr.

In the Supreme Court of the U. S.

JOSEPH W. PARISH & Co. *for the use* JOSEPH W. PARISH, *Appellants*,

vs.

THE UNITED STATES. *Appellee.*

I.

Statement of the Case. Questions Involved, and Manner in which they are Raised.

In January, 1863, at Washington, D. C., the Surgeon General's Department advertised proposals to furnish ice for medical and hospital purposes until the 1st day of January, 1864, at St. Louis, Cairo, Memphis, and Nashville, Tennessee, and other points. The appellants were bidders, and their bid for the four places named was accepted, and on the 5th of March following, articles of agreement were signed, in which the appellants agreed to deliver at the points specified the whole amount of ice required to be consumed during the remainder of the year 1863; and the Department stipulated that the appellants should receive per ton for ice delivered at Nashville $25 per ton; for ice delivered at Memphis and Cairo $20 per ton; and for ice delivered at St. Louis $16 per ton.

R. C. Wood was assistant Surgeon General, acting in that official capacity at St. Louis before and after the 25th day of March, 1863.

Henry Johnson, on the 5th of March, 1863, was medical storekeeper, U. S. A., and, at the time stated, on duty as acting medical purveyor at Washington, D. C.

Joseph B. Brown was, on the 25th day of March, 1863, and during the months of April and May, 1863 a surgeon, United States Army, with the rank of major, and on duty in the office of the Assistant Surgeon General, United States Army, at St. Louis, Mo.

The following instructions were given by the Surgeon General of the United States to said Assistant Surgeon General R. C. Wood, with others, viz:

"The President is desirous that the sick should be cared for, as far as possible, within the limits of the commands to which they belong.

"You are authorized to approve requisitions of medical purveyors on the purchasing purveyors, a duplicate of the requisition being sent to this office in order that it may be furnished by a purveyor, to be designated by the Surgeon General. In case of necessity, you may yourself order the immediate purchase of such medicines and other supplies as may be required, informing me as soon as possible of your action.

"Of course it is impossible for me, even if it were desirable, to ask your attention to subjects which of course will, in the ordinary routine of business, come under your notice.

"Your large experience and devotion to the Army and the corps are ample guarantees that the important duty assigned to you will be faithfully and efficiently performed.

"The States of Indiana, Illinois, Kentucky, Tennessee, Missouri, Kansas, Iowa, Wisconsin, Minnesota, and Michigan, with such parts of Alabama, Mississippi, and Arkansas as are occupied by the troops lately under Major General Halleck's immediate command, are those over which your jurisdiction will extend."

On the 25th day of March, 1863, the Assistant Surgeon General at St. Louis caused the following order to be made and served upon the appellants, viz:

"ASSISTANT SURGEON GENERAL'S OFFICE,
"*St. Louis, Missouri, March* 25, 1863.

"Messrs. J. W. PARISH & Co.,

"GENTLEMEN: I am instructed by the Assistant Surgeon General to direct that the ice you have agreed to deliver at the points designated in your contract shall be distributed in the following quantities: At St. Louis 5,000 tons; at Cairo 5,000 tons; at Memphis 10,000 tons; at Nashville 10,000 tons, making the total 30,000 tons which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field and should be furnished without delay.

"Very respectfully, your ob't servant,
"JOSEPH B. BROWN,
"*Surgeon U. S. Army.*

"By order of the Assistant Surgeon General."

Prior to the delivery to the said Parish of the above order of March 25, 1863, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and after the delivery of said letter to him he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2d day of April, 1863, apprised of the order of Surgeon General Hammond, of March 31, he had purchased, or contracted for the purchase of, 23,000 tons of ice.

The order of Surgeon General Hammond was in the following words, viz:

"SURGEON GENERAL'S OFFICE.
March 31, 1863.

"Parish & Company have not contracted for 30,000 tons of ice. Suspend the order you gave him.

"W. A. HAMMOND,
Surgeon General.

"Col. R. C. WOOD,
"*Ass't Surgeon General U. S. Army, St. Louis.*"

The whole amount of ice which was received by the officers of the Government under said contract, omitting fractions, was as follows:

	Tons.
At Saint Louis	4,174
At Cairo	1,388
At Memphis	6,456
At Nashville	750
Total	12,768

For this quantity the said Parish has been paid the contract prices.

Of the 23,000 tons of ice purchased by said Parish between the 25th of March and the 2d of April, 1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi River was such that, with a sufficiency of steamboats and barges present there in the early part of that month, that quantity might have been transported southward to St. Louis and the other places at which the said Parish was required by said contract to furnish said ice; and after that month the water in said river became and continued so low that the said ice could not be so transported southward, and the same melted and was lost to the said Parish.

The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid.

Parish was orally informed of the suspension of said order on the 2d of April, 1863.

This order of suspension continued standing throughout the year without change.

The Court of Claims has not found the precise amount of damages sustained by the appellants by reason of the suspension of the order of March 25, 1863, but find enough to show that it was very great. In fact the Lake

Pepin ice cost and was paid for at from four to six dollars per ton, and all the other a higher rate. So that the appellants, by the refusal of the Government to receive said ice as ordered, actually lost one hundred thousand dollars, with no allowance for time, risk, expenses, interest, &c.

Failing to obtain any redress from the Medical Department for this great injury, the appellants appealed to Congress for relief, and on page 3 of the transcript will be found an act passed by that body approved May 31, 1872, authorizing the appellants to sue the United States in the Court of Claims to recover such damages as they may have sustained by reason of the alleged violation of the contract in the refusal of the Government to receive the entire 30,000 tons named in the said contract.

Accordingly, under this act, the appellants brought their suit, and in their amended petition, on which they seek to recover, found on page 8, 9, 10, 11 and 12 of the transcript, are set out substantially the foregoing facts, alleging additionally thereto their loyalty during the war, and the amount they were entitled to recover, namely $251,887.72.

To this petition the defendant interposed three pleas.

1. A denial of the facts therein set forth;
2. A special plea of *res adjudicata;*
3. The statute of limitation.

These two last pleas were traversed by replications, and afterwards abandoned by the Attorney General and are now laid out of the case. The cause was tried upon the issue made by the first plea under the evidence produced on both sides, and on due consideration of the premises three of the five judges (two dissenting) found for the defendants, and ordered that the claimants' peti-

tion be dismissed, because the letter or order of Assistant Surgeon General Wood was no part of the contract and imposed no liability on the Government; and because the Assistant Surgeon General at St. Louis had no authority to order said contractors to furnish any definite or fixed amount of ice or medical supplies, their contract having been made with officers of supreme superior rank to furnish all supplies of that class needed.

From this judgment the complainants have appealed to this Court.

II.

a/grument ~~Argument~~ of Errors.

The said Joseph W. Parish & Co. say that the Court of Claims, in giving the judgment aforesaid, contained in the record aforesaid, that their petition be dismissed, committed manifest error in this, to wit: That the said Court of Claims of the United States, after finding that the said contract of March 5, 1863, had been made and entered into between the appellants and the United States, as in the petition of the appellants is alleged, and that the order of the Assistant Surgeon General, of date March 25, 1863, to the appellants, to furnish 30,000 tons of ice and 20,000 tons without delay had been made, as in said petition alleged, and that the appellants thereafter and before they were, on the 2d day of April, 1863, apprised of the aforesaid order of Surgeon General Hammond of March 31st, had purchased or contracted for the purchase of twenty-three thousand tons of ice, in addition to eight thousand one hundred tons owned by them on the day of the date of said order, and that said order was suspended on April 2, 1863, by the United States; and the United States received during said year 12,768 tons only, and that ten thousand tons of said 23,000 tons

were purchased at a point from which it could be transported during the month of April only, and was wholly lost to the appellants; did find and conclude and adjudge that the appellants could not, as matter of law, recover damages sustained by them in the premises from the United States.

And there is also manifest error in this: That the said Court of Claims after finding that R. C. Wood was Assistant Surgeon General of the United States Army duly assigned to duty in St. Louis, with jurisdiction over the State of Missouri, Illinois, Kentucky, Tennessee and other Western States, did find and adjudge and conclude that he had not authority to order for and designate for the United States, any definite or fixed quantity of ice or hospital supplies for the immediate use of the sick of the armies in the field. And that such an order given by said Assistant Surgeon General to contractors with the United States to furnish the medical supplies ordered, acted upon by said contractors to their damage, create no obligation in law on the part of the United States to pay said damages.

And there is manifest error in this, that the said Court of Claims did dismiss the petition of the said appellants and deny to them the relief prayed.

And also in this, that the Court of Claims did give the judgment aforesaid against the appellant in favor of the United States; whereas by the law of the land, the same should have been given in favor of the said appellants and against the United States. Wherefore and for other errors in the record and proceedings apparent, the appellants pray that the said judgment may be reversed, and judgment may be ordered in favor of said appellants against the United States, as prayed for in said petition

III.

Brief.

I. The official acts and orders of an officer of the Medical Department of the Army, of the rank of Colonel, and Assistant Surgeon General, who has been assigned to duty, and given the general supervision of all medical affairs in a territorial department, comprising many States, are, in the absence of fraud, unless in violation of law, obligatory upon contractors and all employees and subordinates of that bureau in said territorial department, and hence are of lawful and binding force upon the United States. All his lawful official orders and acts, are the orders and acts of all his superiors, and of the United States, and the United States are bound and concluded thereby.

2d. Article of War, Revised Statutes, page 220.
21st. Article of War, Revised Statutes, page 231.
Allen vs. *Blunt*, 3 Story, 742.
United States vs. *Anedento*, 6 Peters, 691.
Wilks vs. *Dinsman*, 7 *Howard*, 88.

The long list of authorities holding acts of officers *de facto*, valid so far as the rights of the public or third persons having an interest in such acts are concerned, might, perhaps, with propriety be cited. But the rule is too well settled for comment or authority.

II. The appellants, being under a contract with the United States to furnish all the ice required at the points named in the contract for the prices specified therein as the same might be needed, upon receiving an order from the Assistant Surgeon General in charge of that department to furnish specific amounts at certain points under said contract, were immediately under obligation to the United States to furnish that specific amount at the price designated in the contract and at the time and place

designated in the order, and having entered upon the performance of this contract and expended large sums of money in part performance thereof, and having been prevented from performing the same fully by the respondent, are entitled to recover as damages the difference between what the performance would have cost them, and the price which the responendts had agreed to pay.

Speed vs. *United States*, 8 Wall., 77; *Phil., Wil. & Balt. R. R. Co.* vs. *Hayward*, 13 How., S. C. R., 344; *Masterson* vs. *The Mayor, &c., of Brooklyn*, 7 Hill, p. 61; *Wilder's case*, 5th Nott. & H., 469.

The general principle laid down in these cases is, that the rule of damages, when the Government has violated its contract, as in this case, is the difference between what the contractors would have received under the contract if it had been fully executed according to its terms, and the amount saved to them by the release from the care, trouble, risk, responsibility and expense attending the full execution of the contract.

Argument.

The first noticeable feature in the disposition of this cause in the court below, is the fact that the claimants were dismissed out of that court upon a question not raised in any way by the pleadings therein, nor yet even suggested or insisted upon by the counsel representing the Government. It was a suit at law to recover damages for the violation of a contract. The facts upon which it was based were fully set out in the petition, including the order of the Assistant Surgeon General, specifying the whole amont of ice (30,000 tons) which would be required to be consumed under the contract. The defendants simply denied the existence of the facts pleaded thereby admitting a cause of action if they were true. Their truth was abundantly established by the evidence.

And yet the plaintiffs below went out of court with their grievance unredressed; and upon a question *de hors* the record raised by the court alone. It is submitted to the greater wisdom of this court, whether, under the circumstances, the appellants have ever had their day in court, in the true sense of the law, and whether this departure from the ordinary practice of trying causes upon the issue made, should be permitted.

2d. The majority of the court held that the order dated March 25th, 1863, at St. Louis, addressed to J. W. Parish & Co., from the Assistant Surgeon General's Office, and fully set out on the 2d page of this brief, was issued without authority; formed no part of the contract between the parties; and imposed no liability on the Government, and the Court said, upon these points, that as the claimants' case rested upon this order, their petition must be dismissed.

We claim that this ruling was erroneous. The validity of said order therefore is the chief question for this court to decide. To reach a correct conclusion thereon, the circumstances under which it was issued, by whose authority, the nature and subject of the contract with which it stands connected, the two-fold character and object of the order itself, and the necessities of the case, must be considered.

The office of Assistant Surgeon General was created by statute, which does not undertake to prescribe the powers and duties of the office. There is nothing in the law establishing the office which makes it necessary that his acts as assistant shall all be ratified and approved by the Surgeon General before they shall be legal and effectual. The implication is, that as assistant he is to share in the execution of the duties and powers which devolve upon the Surgeon General himself; and when he

does so within the limitation of the law, his acts are as binding on the Government and as effectual at law as if they had been performed by the Surgeon General.

During the late war the medical and hospital department of the Army was divided into two geographical districts; the head-quarters of one was at Washington, D. C., that of the other at St. Louis, Missouri. The Surgeon General, W. A. Hammond, presided over the former, whilst the Assistant Surgeon General, Col. R. C. Wood, did so over the latter; the boundaries of whose district will be seen defined in the last clause of the Surgeon General's letter of general instruction to the Assistant Surgeon, Wood, dated the 28th July, 1862, found on pages 14 and 15 of the transcript, and reads as follows:

"The States of Indiana, Illinois, Kentucky, Missouri, Kansas, Iowa, Wisconsin, Minnesota, and Michigan, with such parts of Alabama, Mississippi, and Arkansas as are occupied by troops lately under Major General Halleck's immediate command, are those over which *your jurisdiction* will extend.

"Very respectfully, your obedient servant,
(Signed) "W. A. HAMMOND,
"*Surgeon General, U. S. A.*"

Now, whilst the Surgeon General had the general supervision of the entire field of this branch of the public service, yet in subordination to him his assistant was, during the war, charged with the duties of the office within the above described district, over which he was expressly told his jurisdiction extended; and thus he was constituted the agent of the Government, as well by necessary legal implication as by the express language of the above letter of instructions, which, among other things, in the fifth paragraph from the bottom, says:

"You are authorized to approve requisitions of medi-
"cal purveyors on the purchasing purveyors, a duplicate
"of the requisition being sent to this office, in order that

" it may be furnished by a purveyor to be designated by " the Surgeon General. In case of necessity you may " yourself order the immediate purchase of such medi- " cines and other supplies as may be required, informing " me as soon as possible of your action."

At the military hospitals during the war there was no sanitary agent more important or more needed than ice; and the same clearly falls within the designation of hospital supplies or stores, and here is express authority from the Surgeon General himself to Col. Wood to order the purchase of the same, saying nothing of his implied powers under the law to do so. Whoever therefore doubts the power of the Assistant Surgeon General, within the scope of his official duties as such, to bind the Government by contract or otherwise, until his official acts are first approved by the Surgeon General, fails to comprehend the legal and official relations of these two officers, with their head-quarters more than one thousand miles apart, or the extent and exigencies of the service, which made it necessary to have the country divided into two territorial divisions or jurisdictions, or the frequent emergencies of the service, where delay in supplying the needed hospital stores would be disastrous, and result in a dereliction of the medical service.

Now, it is true, that this ice contract was entered into at Washington, under the direction of the Surgeon General; but it was to be executed in the Mississippi Valley, within the jurisdiction and supervision of Col. Wood, the Assistant Surgeon. The contract itself specified no other quantity to be supplied than the following, namely, " The whole amount of ice required to be consumed at each respective point and vicinity thereof during the remainder of the year." This omission to state the amount in weight or tons, so that the contractor could make the necessary preparation to deliver it as re-

quired, was left open, for the reason that the medical purveyors and surgeons of the hospitals in Col. Wood's district, from their previous two years' experience, could furnish a more accurate estimate of the quantity that would be required than from any other quarter.

It was the third year of the war; many battles had been fought in the Southwest, and numerous hospitals had been established to provide for the treatment of the sick and wounded. The quantity of ice used in these hospitals the previous years furnished a reliable data for estimating the amount that would be needed the ensuing year. Col. Wood, availing himself of this information from the medical directors and purveyors under him, did notify in advance the parties under the contract, of the quantity of ice that would be required to be consumed at each of the four points named in the contract.

The contract by its terms was to be executed in Col. Wood's District. He was the head of that District, charged with the performance of the same class of duties as that of the Surgeon General himself, and it became his official duty to see that this contract was faithfully carried out by the contractors.

It is too plain for argument or discussion, that authority and power in the military service is vested by rank, and is exercised by virtue of rank solely.

Under the act of Congress referred to, the Assistant Surgeon General stood next in rank to the Surgeon General; and when on duty in a territorial department, to which he had been duly assigned, in the absence of the Surgeon General his authority in all matters pertaining to the medical department is supreme. If this is not so, then why is he assigned to a territorial department, with fixed territorial limits. Does not the executive authority of the United States say to all citizens and all men, by such an assignment within these limits, the

whole power of the United States, that under the Constitution and laws is vested in any officer or department, will be exercised by the officer so assigned?

The assignments by the President of generals to the command of armies and departments, of quartermasters and commissaries to the positions of chiefs of these branches in armies or departments, illustrates this whole doctrine. Relative rank is relative authority and power; and orders given by the highest officer in rank, pertaining to a matter over which he exercises his control, is lawfully issued, and obligatory upon all subordinates until revoked. It is the order of the Government and sovereignty; and if advantages result, the Government obtains them, and if damages result in matters of contract from such causes, the Government must sustain them. In the crisis of battle the sovereign power of the whole nation, by loss of all officers of higher grade, may devolve upon a lieutenant, who may give orders involving the life or death of thousands of citizens.

The order, then, of the medical officer highest in rank in a territorial department to which he had been assigned, in all matters pertaining to his branch of the service, is, and in the very nature of things must be, conclusive upon the United States, and all subordinate officers, soldiers, contractors, and retainers of the army under him. The sovereign power is vested somewhere in some officer in the territorial department as pertains to the matter of medical supplies. Where is it vested if not in the officer of highest rank?

Again, the Assistant Surgeon General was an officer of higher grade than the medical purveyor. Hence, the purveyor was subject to his orders; and if the Assistant Surgeon General could order the purveyor to purchase, could he not lawfully order a contractor with the purveyor to deliver specified amounts of supplies at certain

times and places? For all these purposes, and these very purposes, he was the embodiment of the United States in that department. Otherwise he had no functions there.

The United States had agreed to pay for so much ice as should be needed. The United States then informed the contractors that they, needed so much, and the contract was complete between the parties for that amount.

Thus far we have been discussing the validity of that part of the order found on pages 9 and 10 of the transcript which states the quantity of ice which the contractors had agreed to deliver, and how the same should be distributed, to the effect among other things, that 10,000 tons each must be delivered at Nashville and Memphis. We now call attention to the clause of the same order, which reads as follows:

"The ice to be delivered at Nashville and Memphis "is for the use of the sick of the armies in the field, "and should be furnished *without delay*."

This part of the order is simply a requisition for ice, made under the contract. Will it be said that the Assistant Surgeon General had not the power even to make a requisition on the contractors for the ice they had agreed to furnish? The majority of the Court below so held when they pronounced this whole order null and void for want of power on the part of the Assistant Surgeon to make it, and yet here was a call for the immediate delivery of 20,000 tons of ice, at two of the points specified in the contract, and after a little upwards of 7,000 tons had been delivered under this requisition at these two points the Government refused to receive any more, leaving some 13,000 tons on the hands of the contractors, which subsequently was a total loss to them. We insist that we have shown the legal

competency of Col. Wood to make this order, that the same was binding upon the Government, and that the Court below manifestly erred in deciding otherwise.

3d. The next inquiry is, what transpired under this contract, how was the same observed by the parties thereto; and what was the treatment which the contractors received at the hands of the defendants.

On p. 17th of the transcript, the Court of Claims found the following facts, that prior to the 25th of March, 1863, the date of the order upon which we have been commenting, Parish, the contractor, had purchased for delivery, under the contract sued, 8,100 tons of ice, and that after the delivery of said order to him, and before the 2d, of April following, when he was first advised of the suspension order of General Hammond, he had purchased, or contracted to purchase, 23,000 tons more of ice; that 10,000 tons of this ice was purchased at Lake Pepin in Minnesota, and that in the month of April, the stage of water in the Mississippi River was such that with a sufficiency of steam boats present at the early part of that month, that quantity might have been transported southward to St. Louis and the other places of which the said contractor was required by the said contract to furnish said ice. And after that the water in said river became and continued so low, that the said ice could not be so transported southward and the same melted and was lost to the contractor. And on the same page the Court further found that the said Parish the contractor *was prepared and willing to deliver the said* 30,000 *tons of ice* in conformity wilh the conditions and obligations of his said contract and the terms of said letter (order) of March 25th, 1863, of which the defendants had notice, but they would not nor did they receive more than 12,768 tons of the ice which was paid for, leaving 17,232 tons to melt on appellant's lands.

According to the facts here found, Parish, the claimant, had contracted for the whole amount of ice required to be furnished in the order of March 25th, 1863, and that too prior to his notification on the 2d of April, following, that the said order had been suspended by the Surgeon General, Hammond. And the Court very truly found also that he was prepared to deliver the same in accordance with the terms of the coutract, for upon this point the evidence was very full and clear that about the 1st, of April of that year, Parish had purchased one boat and had engaged a fleet of boats and barges to go up and bring out the ice purchased at Lake Pepin early in April. The facts show that this was practicable, but the suspension order came and the boats were not sent up. Still Parish was prepared and ready to fulfil to the letter his contract. He had purchased all the ice required, at a heavy expenditure, he had made all the preparation for its delivery at a heavy outlay of money. There was nothing left for him to do except simply to deliver the ice. Now at this juncture of the transaction the Surgeon General at Washington, suspends the order for 30,000 tons of ice, which suspension the Court find, on p. 18 of transcript, was continued unchanged and unmodified during the remainder of the year.

This Court will, of course, note the distinction between the suspension of a contract and the annulment thereof. The latter makes void and inoperative altogether, whilst the former means a temporary intermission, or to cease proceeding for a while, and clearly implies the power to make it.

The effect of this suspension was very disastrous to Parish, whilst it recognized the power to issue the order it held up its execution for further instructions. Of course, under these circumstances, Parish was not at

liberty to dispose of this ice in any way to other parties to partially indemnify himself for his great expenditures in purchasing the same, but was bound to hold on to it, to take care of it as best he could, to transfer it to rented ice-houses in order to preserve it for any future requisition by the Government. This subjected him to great additional expense, and yet 17,232 tons of this ice was never called for nor would it be received, and proved an entire loss to the contractor, which was a clear breach of the contract.

And this was not the only breach and hardship to which Parish was subjected by the strange conduct of the Government officers. It will be seen by the last clause of the contract made at Washington under the superintendence of the Surgeon General, page 9, that it was the clear intent and understanding of the contracting parties that the Government was to receive this ice at the different points in large quantities or by the cargo, and store and keep the same in its own ice-houses. That clause of the contract reads as follows:

"It is further agreed that the said J. W. Parish & "Co. will allow three working days for discharging "each cargo at either one of the points beforemen- "tioned; after that time damages to be allowed by the "said Henry Johnson, Medical Storekeeper United "States Army, as per charter party or bill of lading of "the vessel."

This clause of the contract was afterward wholly ignored by the Government officers, and in lieu thereof the Surgeon General at Washington on or about the 3d of April, 1863, instructed the Assistant Surgeon General at St. Louis to advise the contractor (which he did, see transcript page 18) to establish depots of ice for himself at St. Louis, Cairo, Memphis, and Nashville, to keep the same amply supplied at all times, so as to fill all neces-

U. S. Supreme Court.

CHARLES W. KIRTLAND,
Plaintiff in Error,

vs.

LEONARD L. HOTCHKISS,
Defendant in Error.

By permission of the Court, granted on the Argument, I file the following Supplemental Brief for Plaintiff in Error. I beg leave also to refer to the Brief prepared by my associate, Mr. Davies, and already filed.

FACTS.

The defendant in error has advertised for sale the land of the plaintiff in error, claiming to act as Collector of Taxes for the Town of Woodbury, Connecticut, under the authority of tax warrants, and for the purpose of collecting taxes imposed on the plaintiff in error by reason of his ownership of bonds secured by mortgage of real estate in Chicago, Illinois. The bonds were made in Illinois; are payable, principal and interest, in Illinois; never have been in Connecticut, but were held at Chicago. The question is, whether or not the statute of Connecticut imposing the taxes complained of is void, in view of the provisions of the Constitution of the United States (Record, folio 14).

I.

THE STATUTES OF CONNECTICUT, TAXING THE LOANS OF THE PLAINTIFF IN ERROR IN ILLINOIS ARE UNCONSTITUTIONAL, BECAUSE THEY INTERFERE WITH THE PROVISIONS OF THE 3D SUBDIVISION, 8TH SECTION, 1ST ARTICLE OF THE CONSTITUTION OF THE UNITED STATES, IN WHICH POWER IS GIVEN TO CONGRESS "TO REGULATE COMMERCE * * * AMONG THE SEVERAL STATES."

1. Commerce "comprehends intercourse for the purpose of trade in all its forms."

Welton *vs.* State of Missouri, 1 Otto, 280.

2. Money is both the subject and instrument of commerce.

Johnson, Justice, Gibbons *vs.* Ogden, 9 Wheat., 589.

McLean, Justice, Nathan *vs.* Louisiana, 8 How., 80.

Daniel, Justice, U. S. *vs.* Marigold, 9 How., 567.

3. The unconstitutionality of a tax is to be determined by the subject upon which the burden is laid.

St. Louis *vs.* Ferry Co., 11 Wallace, 423.

Ward *vs.* Maryland, 12 Wallace, 426, 428.

State Freight Tax Case, 15 Wallace, 232, 272.

4. The effect, and not the purpose of the law, is to be considered.

Strong, *J.*, State Freight Tax Case, 15 Wallace, 271.

5. Any statute regulates commerce that lays a heavier burden of taxation upon business or property by reason of its foreign character, than upon other business or property, or which discriminates

against, or prevents the free transit of property or persons from one State to another.

Brown *vs.* Maryland, 12 Wheaton, 436.
State Freight Tax Case, 15 Wallace, 232.
Welton *vs.* State of Missouri, 1 Otto, 275.
Cook *vs.* Pennsylvania, 7 Otto, 566.
Crandall *vs.* Nevada, 6 Wall., 35.

6. In conferring upon Congress the power to regulate commerce among the States, it was the purpose of the framers of the Constitution to make all interstate commerce absolutely free.

Erie Railway Co. *vs.* State, 31 N. J., 531.
Crandall *vs.* Nevada, 6 Wall., 35.

7. The effect of the statute in question is to retard the movement of money from the State of Connecticut to other States, and to confine the capital of the citizens of Connecticut to use and investment in that State.

(1) By the discrimination against foreign invested capital, in charging the tax in the case of such case on the lender, while in the case home invested capital, it may be charged on the borrower; and,

(2) By subjecting foreign invested capital to double taxation by conflicting jurisdictions, *e. g.*, in Connecticut and in Illinois; for it must be conceded that the loans of the plaintiff in error were, when made, proper subjects of taxation by the State of Illinois, it being a fundamental principle that the power to tax extends to all property or business within the limits of a State.

Parham *vs.* Woodruff, 8 Wall., 123.
Osborne *vs.* Mobile, 16 Wall., 482.

(*a*) The business of loaning in this case was transacted in Illinois.

(*b*) The property securing the loan is there situated.

(*c*) The debtor there resides.

(*d*) The instruments evidencing the debt are kept there.

(*e*) Nothing shows that even the income derived by way of interest from the capital invested, is or ever has been in Connecticut; and this income if there, Connecticut does not seek to tax by the statutes complained of.

8. If foreign business or property is subject to taxation by both the sovereignties, it is necessarily more heavily burdened than domestic business or property subject to taxation by one sovereignty only.

If Connecticut, by statute, lays a tax upon the same subject matter that is liable to be taxed by Illinois, she necessarily discriminates against the foreign property or foreign business, in favor of similar property situate within her own borders, owned by her resident citizens, and of similar business performed within her own borders by her resident citizens.

9. Connecticut does not possess the power to discriminate against the making of foreign loans by her citizens, by taxing such loans to any extent, because she has no power to regulate the commerce in money of her citizens with the citizens of other States.

"The power to tax involves the power to destroy."

Ch. J. Marshall, McCulloch's *vs.* Maryland, 4 Whea., 316.

The power to tax foreign loans *at all* involves the power so to tax them as to prevent the loaning by the citizens of the taxing State of any of their money, at any rate of interest, upon any terms, to any parties outside of its own territorial limits.

See Strong, *J.*, State Freight Tax Case 15, Wall., 276.

If the Legislature of Connecticut has the power to say that one of its citizens shall not part with

the possession of his money for the purpose of loaning it outside of its territorial limits, it would equally have the power to say that he should not take it outside of such limits for any purpose. The State, in that event, would have the right to place an embargo preventing its citizens from conveying any species of property out of its limits.

10. The cases on the importation and exportation of slaves do not conflict with the views here expressed, although apparently opposed to them. The decisions in these cases turned upon the idea that slaves were persons, although subject, as property, to the rights of their masters, which rights were dependent wholly upon the local laws of the State where the slave might be for the time being.

Allen *vs.* Sarah, 2 Harrington, 434.
Groves *vs.* Slaughter, 15 Peters, 449.
Comm. *vs.* Griffin, 3 B. Monroe, 208, 214.
Crandall *vs.* Nevada, 6 Wall., 41.

11. The statutes of Connecticut do not tax loans to resident debtors made by her citizens, secured by pledge of real estate in Connecticut, when the debtor resides in the town where the real estate is situated, and fails to ask for a deduction from the assessed valuation of his real estate by reason of his mortgage indebtedness. (Sections 8, 35, 36 and 37, pages 709 and 715, title 64, chapter 1, section 8; see pages 12 *et seq.* of main brief in this case for the provisions of the statutes in full.)

No deduction from the assessed valuation of real estate for the purposes of taxation is permitted to a mortgagor in Illinois, by reason of his mortgage indebtedness.

Connecticut, therefore, by her statutes, discriminates, in taxing loans on bond and mortgage against mortgagees who loan in Illinois and in other States where no such deduction is permitted, in favor of her own residents making similar loans on lands within the State.

Such a discrimination is a regulation of commerce in money among the States.

12. This latter discrimination exists, and the statute must equally be regarded as regulating commerce among the States, if the Court adopts the fiction that "personal property follows the owner" in matters of taxation.

Even if this fiction permits the taxation of the plaintiff in error as the owner of "property within the State of Connecticut, that" property is discriminated against by reason of its foreign origin by force of the statute, and has to bear a heavier burden of taxation than under a similar state of facts would be laid upon a loan of money on bond and mortgage to a resident of Connecticut by a resident creditor.

13. The taxation of a contract securing a loan of money falls upon the borrower.

Weston *vs.* City of Charleston, 2 Peters, 449.

The statutes of Connecticut discriminate against non-resident borrowers on bond and mortgage from her citizens, and for that reason regulate commerce in money among the States.

14. The bonds of the plaintiff in error and the credits evidenced by them, are "commodities" and articles of commerce. Similar contracts are daily the subjects of "trade and barter," and they have an "existence and value independent of the parties to them."

Paul *vs.* Virginia, 8 Wallace, 168.

Notwithstanding the continued physical presence of the bonds of the plaintiff in error in Chicago, the statute of Connecticut assumes to tax them, and to discriminate against them and the debts evidenced by them by reason of their foreign origin.

"It is sufficient to hold now that the commercial power continues until the commodity has ceased to

be the subject of discriminating legislation by reason of its foreign character."

Welton *vs.* Missouri, 1 Otto, 275.

II.

THE STATUTES IN QUESTION VIOLATE THE PROVISIONS OF THE 1ST SECTION, 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BY WHICH IT IS PROVIDED THAT NO STATE SHALL "ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES."

1. The right of free access to any State, and of free ingress and egress to and from any State, is guaranteed to every citizen of the United States.

"We are all citizens of the United States, and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

Ch. J. Taney in Passenger Tax Cases, 7 Howard, quoted in Crandall *vs.* Nevada, 6 Wallace, 35, 49.

2. The right of free access to any State is hampered and obstructed by the imposition of a tax upon property acquired or business performed in that State, by a statute of the State where the traveler resides.

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create * * * * are propositions not to be denied."

Ch. J. Marshall, McCulloch *vs.* Maryland, 4 Whea., 316.

3. The right of free access to a State is coupled with the right of transacting any business therein lawful

in that State, or of acquiring any property therein, the acquisition of which is permitted by its laws. If the State of the traveler's residence can tax him with respect to that business or property, it can absolutely prohibit him from transacting the business or acquiring the property. Such unlimited power over its citizens has been denied to the State.

Lamb *vs.* Bowser, 7 Bissell, 315, 372.

4. The right claimed for the State of Connecticut in this case, if established, will give her the power to punish as crimes all acts extra-territorially committed by her citizens, whether criminal or not by the laws of the State where they may have been committed.

The power of Connecticut to tax her citizens in any degree or in any manner with respect to contracts or credits payable in other States, arising from loans of money made by them, involves the power to tax all extra-territorial contracts of pecuniary value.

5. The power claimed for the State of Connecticut involves the power to pass laws of non-intercourse between her citizens and the citizens of other States. The power to pass such laws is a belligerent right. No State of this Union possesses belligerent rights against another.

III.

THE STATUTE COMPLAINED OF TAXES PROPERTY OR BUSINESS WITHOUT THE STATE OF CONNECTICUT.

(A) The statute speaks of "money." It is clear that the money loaned by the plaintiff in error was without the State of Connecticut. It had been loaned in Illinois, to a citizen of that State.

The statute speaks of "bonds." The "Finding" states that the bonds themselves were held in Chicago. They never were in Connecticut.

The statute speaks of "credits, choses in action." There is nothing visible and tangible about a

"credit." It is a mere mode of expression, representing the fact that the relation of debtor and creditor exists, but it can have no situs, because it can occupy no locality or portion of space. It is called "property," figuratively, because it relates to visible, tangible things that are themselves property, and it is so called only for that reason. The statute taxes "credits" as property. This statute is invalid, not because credits are not property (as indeed they are not), for the invalidity of the statute depends upon other reasons than the misuse of accurate language, but for the conclusive reason that these "credits" are neither actually nor figuratively property *within* the State of Connecticut. Credits cannot be actual property, within the State of Connecticut, for the physical reason that they have no physical existence in any place. They can be figurative property only by force of the old maxim that "personal property follows the owner."

This maxim no longer determines the situs of a non-negotiable chose in action.

Noonan *vs.* Bradley, 9 Wall., 415.
Miller *vs.* U. S., 11 Wall., 296.
Brown *vs.* Kennedy, 15 Wall., 501.

This maxim is peculiarly inapplicable to questions of taxation; for protection of the subject taxed is necessary to its valid taxation.

Cooley on Taxation, pp. 2, 14, 42, and cases cited.
See Observations of Waite, *C. J.*, in Tappan *v.* Bauh, 19 Wall., 490, 508.

Whether or not a figurative situs in Connecticut is to be assigned to the "credit," or "choses in action" of the plaintiff in error, depends upon the fact whether or not Connecticut protects those "credits" or "choses in action." Their value consists in the existence of the

debtor's property to meet them. If it were not so, debts due from an insolvent would be as fair subjects of taxation as those due from a solvent debtor; yet no State has so far shown its belief in the doctrine that debts are property as to attempt to tax the former class. The property of the debtor is not protected by Connecticut, but by Illinois, the residence of the debtor. The bonds evidence the existence of certain rights of the plaintiff in error in that property. That property and those rights are alone protected by Illinois, where the rights of the plaintiff in error must be enforced. The *jus disporendi* of the plaintiff in error may be exercised by him in Connecticut, if Illinois does not will otherwise. This right exists only by virtue of the permission of Illinois, and its exercise in accordance with the laws of Connecticut is only possible by means of comity extended by Illinois. The rights of the plaintiff in error in his debtor's property inhere and adhere to that property, and cannot be separated from it, even figuratively, for the purposes of taxation; for no jurisdiction, save that where the property actually is, protects these rights. Rights in real estate, and in visible, tangible personal property, if they be those of an owner, are taxed by common consent where the property is. If one be a mortgagee, that circumstance alone does not expose his rights in property to taxation by a jurisdiction that does not protect them.

(B) A tax upon a contract securing a loan of money is necessarily a tax either upon the property of the debtor or upon the acts of business resulting in the contract, and falls in either case upon the debtor.

This principle was determined in the case of *Weston* v. *City of Charleston*, 2 Peters, 449. That the tax imposed upon United States stock falls upon the borrowing power of the United States Government, is the reason assigned for denying to the States the right to impose such a tax.

Whether the tax that Connecticut claims to im-

pose upon the bonds of the plaintiff in error by the statute in question falls upon the property of Cummings, the debtor, or upon the acts of business performed in Illinois resulting in the existence of these bonds, the subject upon which Connecticut attempts to lay a burden of taxation is equally without her territorial limits.

Attention is particularly called to two recent cases, in which the precise question involved in this suit has been determined by a court of highest State jurisdiction, in accordance with the views here advocated on the part of the plaintiff in error.

19 Kansas, 414, Fisher *vs.* Com. of Bush Co.:

"Persons residing in this State (Kansas) are not subject to taxation and assessment in respect to business or interests beyond the territory and jurisdiction of the State, and which the laws of the State cannot in any way reach or protect."

The law of the State of Kansas in this case imposed a tax on debts due to the residents of the State from citizens of other States.

Fisher, the plaintiff, owned notes secured by mortgage on land in Iowa. The notes were payable in Iowa, and were kept in the hands of a banker there for collection. The case seems on all fours with the one at bar.

The Court said: "Taxation and protection are correlative terms. Protection to that portion of the property not taken or absorbed by the tax, is the compensation or consideration for all legislative taxation. Without this protection, or some benefit to be returned therefor, taxation would be but another form of spoiliation or confiscation. To sustain the decision of the District Court would be to ignore the fundamental principle upon which taxation is based, and authorize the taxation and assessment of persons in respect to *business or interests beyond the territory and jurisdiction of Kansas*, and which the laws of the State could in no way reach or protect.

"This principle, if logically followed out, would extend to real estate and to all conceivable business, titles and transactions in other States and countries, and at once the power of taxation would be limited no longer to persons, property and business within its jurisdiction."

Varner *vs.* Calhoun, 48 Ala., 178:

"Gold and United States Treasury notes on deposit in New York, and stocks of foreign corporations owned by citizens of this State, are not subject to taxation by the State under any provisions of the revenue law of 1868." This revenue law of 1868, defining the subjects of taxation, as quoted in the case, thus reads: "All money *hoarded* or kept on deposit, subject to order, either in or out of the State; all investments in the stock of any company or corporation out of the State." The Court, in giving its opinion, said: "There is a recognized division of laws into personal and real (physical actualities) statutes. The former pertain to the person, and are of general obligation everywhere; the latter have for their object *property*, and have no extra-territorial force or obligation. Under this latter denomination is included our State revenue laws. No State would permit the collection of taxes, by suit or otherwise, for the support of a foreign government. Capital, no less than population, is a welcome immigrant. If the States or countries whence it comes can pursue it for purposes of taxation, the consequent confusion would be inextricable and disastrous. The mere evidence of its ownership, whether a certificate of deposit or of stock, or other title, though held in this State, is *not the property*, nor can it change its location. Story's Con. of Laws, secs. 12, 13, 18, 29; Bank of Augusta *vs.* Earle, 13 Pet."

See also Bridges *vs* Mayor, 33 Georgia, 113.

IV.

The plaintiff in error insists upon the other constitutional objections to the statutes in question contained in the main brief herein.

1. That the statute of Connecticut herein complained of are repugnant to the provisions of the Constitution of the United States, for the reason that in directing the taxation of a subject that is beyond its jurisdiction, it violates and interferes with the sovereignty of the State of Illinois.

Point III, brief, page 48, and cases there cited.

2. That the statutes of Connecticut herein complained of are repugnant to the tenth section of the first article of the Constitution of the United States, by which it is provided, that "No State shall * * * pass any * * * law impairing the obligation of contracts."

Point IV, brief, page 57, and cases there cited.

3. That the statutes of Connecticut herein complained of are repugnant to the Fourteenth Amendment of the Constitution of the United States, by which the States are forbidden to deprive any citizen of life, liberty or property "without due process of law."

Point V, brief, page 60, and cases there cited.

4. That the statutes of Connecticut herein complained of are repugnant to Section 2, Article 4 of the Constitution of the United States, by which it is provided that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

Point VI, brief, page 66, and cases there cited.

V.

RECAPITULATION.

1. *Commercial power.*—The power to impose discriminating burdens is a power to prohibit or destroy. Mr. Kirtland was burdened on account of the foreign *origin* of his bonds and mortgages, and this discrimination brings this case within the ruling in the case of Welton *vs.* State of Missouri, 1 Otto, 280.

An enactment by a State of non-intercourse in loaning money by its citizens in other States, would preclude and prohibit the transfer and transportation of their money or other capital to other States.

2. The fiction of law that a credit is property and follows the owner in the State of his residence, is only a rule of comity, and is not applicable in this case; but if it were applicable it must yield to the positive grant of power to Congress over commerce between the States, which means that commerce between the States shall be absolutely and uniformly free throughout the United States.

3. The business of making contracts is taxable in the State where made and when made.

Osborne *vs.* Mobile, 16 Wall., 482.

The power of a State to tax all *sales* of commodities made within it, and when made, without reference to their origin or the citizenship of the owner or agent (Parham *vs.* Woodruff, 8 Wall., 123), cannot be distinguished in principle from the power to tax all *loans* of money or of other things where the loans are made, and when made, without reference to the citizenship of the lender or the foreign origin of the money or thing loaned.

4. The power of Illinois to tax money within her limits, or an act of loaning and borrowing money there, must, under our form of government, exclude the power of another State from taxing Illinois money, or an act in Illinois of loaning and borrowing. "The several States are of equal dignity

and authority, and the independence of one implies the exclusion of power from all others" (Pennoyer *vs.* Neff, 5 Otto, 722.) The question of jurisdiction is not confined to real estate. It is alike applicable to business, real and personal property.

5. *Immunities of citizens of the United States.*— This Court has held that a citizen of the United States possesses privileges and immunities which the State of his residence cannot invade, and that among these privileges is the right to pass in and out of all the States (Crandall *vs.* State of Nevada, 6 Wall., 35). But this right would be a fruitless right, and cannot be said to exist in conjunction with a co-existing, nullifying right of the State of his residence to punish him or discriminately burden him for his acts, his lawful business or his property in another State.

6. Taxation is "due process of law," but an arbitrary exaction on a subject not within the jurisdiction of a State is not taxation. All jurists agree that it is not taxation to take property from A and give it to B, and the same principle is involved if the property is taken from A and given to B, C, D, &c., the entire population of a State, if the taking of the property is not by virtue of constitutional taxation. Confiscation is not taxation nor "due process of law."

VI.

The plaintiff in error prints, as part of his argument herein, the opinion of Justice Foster in the Court below, dissenting from the views of the majority of that Court.

THE INJUNCTION OBTAINED BY THE PLAINTIFF IN ERROR AT THE INCEPTION OF THIS CAUSE SHOULD BE DIRECTED TO BE MADE PERPETUAL, WITH COSTS.

ASHBEL GREEN,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF ERRORS,

STATE OF CONNECTICUT.

CHARLES W. KIRTLAND,
Plaintiff in Error,

vs.

LEONARD L. HOTCHKISS,
Defendant in Error.

Dissenting Opinion.

FOSTER, *J.:* Since the close of our late civil war the subject of taxation has become one of absorbing interest. Very large sums of money are necessary to meet even the interest on the immense debts of our country, our State, and our various municipalities. It is but natural therefore that there should be an eager desire to bring all persons, all forms of property, all business, all the incidents of business, under the taxing power, that the revenues may be increased. Sound principles may be violated, palpable wrong may be done, but if the result be to lighten the public burdens, there is great danger that any protestations against the wrong, or appeal for relief, will be listened to with great impatience.

Taxation is a necessary attribute of soveignty. As the exigencies of government cannot be limited, there can be no restriction on the power of the State to tax, except what may be found in the organic law. The power is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business.

Taxation and protection are correlative terms. Protection to the person is the ground on which the right to tax the person rests. Protection to the business, protection to that portion of the property not

taken by the tax, is the consideration or compensation for all legitimate taxation on business or on property. The person must be domiciled within the State to be subject to a personal or poll tax; the business or property must also be within the territory of the State to confer jurisdiction over them.

These are very plain and simple principles, almost too familiar to be repeated; and yet there seems to be danger lest they should be overlooked or forgotten in considering such a case as is now before us.

That the person of the plaintiff is within the jurisdiction, and subject therefore to the taxing power, is apparent from the record. This tax, however, is not imposed on the person; it is imposed on the property of the plaintiff, and as such it must be sustained, if sustained at all. Property is a word perhaps spoken and written almost as frequently as any word in our language, and sometimes with very vague ideas attached to it. What is property?

It is the product of labor, and is always measured by labor. Property, and the rights of property, cannot be credited except by an application of labor of some kind to material substances. Property, therefore, is embodied and accumulated labor. Where the rights of labor are recognized, it is endued with the attributes and incidents of titles, inchoate, equitable, or legal, which inhere in the property, follow it, and form a component part of it wherever found. The case does not require any description of the various species of property, real, personal, &c. Real property has of course an immovable situs, and can never be subject to any taxation except that imposed by the government within whose jurisdiction it is situate. The reason is, that that government is the only one that can afford it protection. Personal property, of whatever it may consist, though capable of being transported from place to place, if it be of a visible and tangible kind, would seem, in the nature of things, to follow the same rule and for the same reason; that is, to be

subject to taxation by the State within whose jurisdiction it is situate, as that State only has dominion over it, and as that State only can afford it protection.

Now if the property in question be considered real property, it being in the State of Illinois, any tax upon it by Connecticut would be extra territorial and void. If it be considered personal property, of a visible and tangible character, it is still in the State of Illinois, and so just as much out of the dominion and beyond the jurisdiction of the State of Connecticut as though it were real property.

If we consider the property to be an interest in real or personal property, or a title, inchoate, equitable, or legal, to such property in Illinois, such interest, or such title, is no legitimate subject of taxation in Connecticut. The corpus and situs of this property being in Illinois, and subject of course to taxation there because within her jurisdiction, no interest in it, no title to it, can be taxable in Connecticut. Such a claim involves one or two absurdities; either that the same property may be in two places at the same time, or that two independent governments can have jurisdiction over the same subject matter at one and the same time.

But the property of the plaintiff on which this tax has been imposed is not real property, nor is it personal, of the character here considered. It may be well to describe it precisely, that there may be no room for misunderstanding.

The plaintiff loaned money in the city of Chicago, in the State of Illinois, on bonds conditioned for its repayment, and secured by deeds of trust. One of said bonds, and one of said deeds, as a specimen of all, is made part of the record. This bond declares "that it is made under, and is in all respects to be construed, by the laws of the State of Illinois, and is given for an actual loan of money ($3,000) made at the City of Chicago, by the said Charles W. Kirtland (the plaintiff) to the said Edmund A. Cummings (the obligor) on the day of the date hereof" (July 17th, 1869).

The deed of the same date is a conveyance in fee, by Edmund A. Cummings and Ellen M., his wife, of a lot of land in the City of Chicago, to Norman C. Perkins, of said city, to be held by him in trust as security for the payment of said loan, with power to sell and convey the same and apply the proceeds in payment of the loan, in case of default on the part of the said Edmund A. Cummings to perform the stipulations of said bond.

It is quite obvious that Cummings has incurred a debt to Kirtland, and that Kirtland has a claim against Cummings. Cummings is the debtor, Kirtland the creditor. Has this debt a situs? If it has, where is it? In Illinois, or in Connecticut? The contract to loan was made in Illinois; there the creditor parted with his money, there is the property pledged for its repayment, there the debtor is domiciled, there the trustee.

This seems to indicate Illinois as the situs of this debt. So far as it is a thing having a substantial existence, it is there, and not elsewhere. Our own statute provides, in terms, "that money secured by mortgages upon real estate in this State shall be set in the list and taxed only in the town where said real estate is situated." This manifestly recognizes the situs of the property pledged as security for a debt as the situs of the debt.

But a debt has no situs. Only a material thing can have a corpus, and only a corpus can have a situs, for it is the location of the corpus that constitutes a situs. A debt is neither visible, tangible, nor ponderable; it has no situs, no corpus. *It is a misnomer to call it property.* In legal phrase it is but a *chose in action, a jus incorporale. It is an equitable title to the property of the debtor, and it inheres, as a title, in the property which it represents.* It does not follow the person of the owner in his domicil, though he may transfer it there.

These views are fully sustained by the United States Supreme Court, in the case of Brown *vs.* Kennedy, 15 Wall., 591. That was a proceeding

under the Confiscation Act of July 17, 1862. The Attorney of the United States for the District of Kansas filed information in the District Court of that district against a bond, dated May 20, 1860, executed by Lawrence Kennedy to Edward S. Brown, and secured by mortgage, made, acknowledged and recorded on the same day, by said Lawrence and Eliza, his wife. The information prayed that process might issue against the bond and mortgage, and against the estate, property, claim, credits and rights thereto and therein belonging to said Edward S. Brown, to enforce the forfeiture thereof. A warrant issued to the marshal of the district, dated March 28th, 1863, commanding him to attach, specifically, the above-named property, and retatin the same in his custody to await the further order of the Court, giving notice to all persons claiming the same to appear on the 20th day of April, 1863, and show cause, if any they had, why the property should not be condemned as forfeited. To this warrant the marshal made return that he had served the same according to the precept; that he had attached the bond, mortgage and credit, and had cited Lawrence Kennedy and Eliza Kennedy, the obligors and mortgagors, &c., &c., as he was commanded to do. On the 5th of May, 1863, the Court passed a decree and ordered that the said bond, mortgage and credit be condemned and declared forfeited to the United States. The decree also ordered Kennedy, one of the obligors and mortgagors, to pay the debt into the Court, for the use of the United States; and, in pursuance of the decree, payment was made to the officers of the Court.

Subsequently to that time, in 1868, Brown, the obligee and mortagagee in this bond and mortgage, having obtained a pardon from the President of the United States, filed a bill in the Circuit Court for the District of Kansas, against Kennedy and wife, for the foreclosure of this mortgage. The principal defense was that the mortgage and debt secured by it had been confiscated under the act of Congress.

That of course put in issue the validity of those proceedings. It was admitted as matter of fact, and agreed, that Brown, the complainant, was and always had been a resident of Virginia, and from June, 1860, until September, 1865, had continuously at his home in that State the bond and mortgage, and that neither of those instruments was, during any part of that term, in the District of Kansas.

The Circuit Court dismissed the bill, and on appeal that decree was affirmed by the Supreme Court.

No court surely can take cognizance of any subject matter until it is first within its jurisdiction. If the debt due from Kennedy to Brown followed the person of Brown, or if we call it a claim, or credit, or property, whatever name we give it, if it was in the possession of Brown at his domicil in Virginia, as the bond and mortgage, the evidences of his debt, were, the proceedings of the court in confiscation, in Kansas, must have been pronounced a nullity, for the conclusive reason that the subject matter was never within the jurisdiction of the Court.

The Court took a distinction between a debt and the written evidences of the debt. The credit in this case had been proceeded against; that had been confiscated, and so the proceeding was held valid. If the proceeding had been against the bond and mortgage only, the decree would have been a nullity, they not being within the jurisdiction of the Court, but in the possession of Brown, in Virginia. Such was the doctrine of the Court in *Pelham* v. *Rose*, 9 Wall., 103, where the note, the evidence of the credit, not the credit itself, was the thing proceeded against. The same doctrine was recognized in *Pelham* v. *Way*, 15 Wall., 196, where the Court held the proceedings, not having been either against the debt or credit, but only against the material evidence of it, and the material evidence having been out of the marshal's jurisdiction, no confiscation had been effected.

If these decisions are to be recognized as law, how can it be claimed that on this credit, given by Kirt-

land to Cummings, in the State of Illinois, secured by a deed of real estate there situate, held by a trustee resident there, the debtor being domiciled there, the debt made payable there, the laws of Illinois, by express agreement to govern the contract; how (for the question bears repeating), how can it be claimed that there is any subject matter within the jurisdiction of Connecticut on which to impose a tax?

Will it be said that the right to personal property draws to it the possession, and as the plaintiff in this case was domiciled in Connecticut, this debt, owed to him from Cummings, in Illinois, must be considered in Connecticut for the purpose of taxation? The cases just quoted are clearly inconsistent with such a claim.

That the right to personal property draws to it the possession, and that it follows the person of the owner, is a well-established principle, and is to be applied under certain circumstances. It is, however, a legal fiction, and was never intended to have any extra-territorial effect. It has been adopted by comity, mainly, if not solely, for the purpose of facilitating the transfer of property. This fiction is by no means of universal application, and, in the language of Judge Story, yields whenever it is necessary, for the purposes of justice, that the actual situs of the thing should be examined. If real estate were made subject to the same rule or fiction of law, clearly it would not be withdrawn from the dominion of the State where it was situate. It would remain subject to taxation there and not elsewhere. This fiction also yields to laws for attaching the estate of non-residents, for such laws necessarily assume that property has a situs entirely distinct from the owner's domicil. The cases of *Hoyt* v. *Commissioners of Taxes*, 23 New York, 235; *People* v. *Gardner*, 57 Barb., 356; *People* v. *Commissioners of Taxes*, 35 New York, 440; *Catlin* v. *Hull*, 21 Verm., 152, and *Green* v. *Van Buskirk*, 7 Wall., 139, with many others that might be quoted,

seem to place this matter beyond controversy. In one of these cases, *People* v. *Gardner*, the Court (p. 357) say: "By a legal fiction, the personal estate of the owner has, for some purposes, been deemed to follow its owner, but in the adjustment of systems of taxation this fiction has been very generally rejected, on the ground that it was productive of unjust consequences." Double taxation may be among these consequences, and that certainly is to be avoided, when practicable, even if we grant the power to impose it. Here, however, the question is not as to double taxation, but simply of jurisdiction. Has Connecticut dominion over this subject matter for the purposes of taxation? Our statutes differ from the statutes of New York and Vermont, whose decisions have been quoted, and in terms, no doubt, embrace the debt or claim in question. The legislative acts of no State can, however, be of force outside its own territory. If the State of Connecticut can tax personal property in Illinois because its owner lives in Connecticut, why can it not tax real property as well? If any legal reason can be given to sustain the one claim, it will be found equally good to sustain the other. The same reasons which exclude a State from imposing a tax on real property outside its own territory, apply with equal force against laying a tax on personal property outside its territory. The State of Connecticut claims and exercises the right to tax personal property within her own limits. That it may be owned by non-residents makes no difference. It is equally protected by our laws as the property of residents. *Sprague* v. *Lisbon*, 30 Conn., 18. We tax the stock of non-residents held by them in banks, and in other corporations in this State, whose stock is taxable. Our statutes also provide that where any real estate, or any amount equivalent to its valuation, is omitted from the list of any person because of an indebtedness secured by mortgage, the amount of such indebtedness shall be added to the list of the creditor, if resident in the same town;

but if he does not reside in the same town, a list shall be made against him embracing such indebtedness, and a written notice addressed to him, that he may appear and show cause why such indebtedness should not be assessed against him.

Two important principles seem fairly deducible from this legislation:—

1st. That a debt is a representative of the property pledged for its payment; a title, inchoate, equitable or legal to that property; and,

2d. That the property and the debt, or more strictly, so much of the property as will be absorbed in the payment of the debt, and the debt, constitute together but one subject for the purpose of taxation.

The tax being paid on the property without diminution on account of the debt, nothing remains to be taxed. The debt indeed, aside from the property behind it, and of which it is the representative, is simply worthless.

In taxing personal property in other States belonging to our citizens, which our Legislature assumes the power to do, the assessors are not required to impose the tax on such property as is shown to them to be fully assessed and taxed in the State where situate, to the same extent as other like property owned by its citizens. Moneys loaned to any party out of this State, and bonds issued by or loans made to any railroad company out of this State, are the only forms of property expressly excepted from this provision.

That the land in Illinois, which is the security for this debt, and of which this debt is the representative, has borne its full share of taxes without diminution on account of this debt, has been already shown. If the land were in this State, this would suffice; no tax could be collected on the debt. That the land is in Illinois cannot affect the principle. If each state has dominion over the property, real and personal, within its territory for the purposes of

taxation, and he must be a bold man who denies it, that dominion must, from its nature, be exclusive. No other State can have concurrent jurisdiction. Nor does any other State become invested with the power to tax, if the State in which the power is vested omits to exercise that power. Should a State exempt the property, real or personal, within its limits, belonging to non-residents, from taxation, by what authority could any foreign State impose taxes on such property? The question is purely jurisdictional, and the matter of double taxation is not involved. The point is not whether the State may tax a thing twice, but whether there is anything within its jurisdiction that it can tax at all.

The power of the State to tax *the business of loaning* money, like the power to tax any business transacted within its limits, by way of license or otherwise, whether the money be loaned to parties within or without the State, is unquestionable.

But this power cannot be exercised by a State when the business is done without the State, though it be done by citizens of the State. Citizens of this State, transacting business in Illinois, must be subject to the laws of Illinois, not to the laws of Connecticut.

The result of this reasoning is, that the plaintiff is not liable to taxation in this State, for these debts owing to him in Illinois. It may by some be considered unjust and unequal that a citizen of this State should be allowed to loan money and not pay taxes upon it. But he may invest his money in land, in merchandizing, in manufacturing, &c., abroad, and escape all taxation here. If the one is unjust and unequal, why not the other? Is it because a tax is presumed to be imposed on land, merchandise, manufactures, &c., &c., owned in other States? Such taxes may be imposed and they may not be, and whether they are or not, does not affect the principle. But if such taxes are imposed, it is a sufficient answer to say, that they are also imposed on the money loaned in this case, that is, a tax is levied on

the property which it represents. The borrower, not the lender, must ultimatelely, if not primarily, always pay the tax on money borrowed. The tax is estimated in fixing the rate of interest. This at once suggests the question how far the citizens of Illinois can be restrained or affected by the laws of Connecticut, in their rights to make contracts, in Illinois, for a loan of money. In the case of *Weston* v. *The City of Charleston*, 2 Pet., 449, principles are enunciated which bear directly on this question. Chief-Justice Marshall, in giving the opinion of the Court (pages 467–8), says: "The right to tax the contract to any extent, when made, must operate upon the *power* to borrow *before it is exercised*, and have a sensible effect on the contract." The State of Connecticut surely can have no power to legislate over persons, or contracts, or business, in the State of Illinois.

Resort must be had to a legal fiction to draw this debt into Connecticut. It does not appear from the record that even the evidences of the debt, the bond and deed, were held in Connecticut. The security for the debt, the deed of trust, belongs, and would naturally be held in the hands of the trustee in Chicago, in whom the legal title to the property was vested. Separated from the property it represents, this debt is not an actuality, but only an idea, an imaginary property. Then, to an imaginary property, we must give an imaginary situs. This is going too far into the domain of the sentimental and spiritual for the purposes of taxation. An imaginary property, with an imaginary situs, has no element of taxation in it.

It should not be forgotten that the duty of the judicial branch of the government is limited to declaring the law as it exists. Any considerations involving its policy or impolicy belong properly to the legislative power. It may not, however, be impertinent, in view of the result to which this opinion leads, to remark, that any system of taxation

which subjects the affairs and business of the citizen, at home or abroad, to public scrutiny, will ever be regarded with extreme disfavor. Such inquisitorial powers are antagonistic to free institutions, and are repugnant and abhorrent to the feelings and sentiments of a free people. The great problem of taxation is, how to make it least burdensome and most productive. This inquisitorial system is felt to be intolerably burdensome, while everybody knows that it is shamefully unproductive.

A much heavier rate, imposed on visible and tangible property, which could not be concealed, and would readily be found, would be far more cheerfully borne, and be found far more productive in practice, than a tax levied on what is sought out and discovered, only after a rigid examination, on oath, of the party. However searching these examinations may be made, it is a notorious fact that vast amounts of property escape altogether the grasp of the tax-gatherer, and so results are now as unequal and unjust as they well can be. The demoralization of the public conscience by the frequent administration of oaths, so often taken only to be disregarded, is an evil of the greatest magnitude. Almost any change would seem to be an improvement.

I cannot concur in the opinion of the Court, but should advise the Superior Court to render judgment for the petitioner.